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The Responsibility of the United Nations for the Wrongful Conduct of its Peacekeepers

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Contents

LIST OF ABBREVIATIONS.....	III
1 INTRODUCTION.....	1
1.1 Topic and research questions	1
1.2 Structure of the thesis	4
1.3 Methodology	4
1.4 Definitions and distinctions.....	5
1.4.1 Responsibility, accountability and liability.....	5
1.4.2 Attribution of conduct versus attribution of responsibility	6
1.5 Draft Articles on the Responsibility of International Organizations.....	7
1.5.1 Codification or progressive development? Resemblance to ARSIWA.	7
1.5.2 Three sets of rules regarding attribution of conduct	8
1.6 Assessing international responsibility	9
2 PEACE OPERATIONS.....	10
2.1 Development of peace operations	10
2.2 Different categories of peace operations	11
2.2.1 Enforcement and peace enforcement operations	11
2.2.2 Peacekeeping operations	12
2.3 Creation of a peace operation.....	13
2.4 Command and control in peace operations	14
3 CRITERIA FOR INTERNATIONAL RESPONSIBILITY FOR THE UN.....	15
3.1 The UN's legal personality.....	16
3.2 Breach of an international obligation.....	16
3.3 The conduct is attributable to the UN	18
4 INTERNATIONAL RESPONSIBILITY FOR THE UN: EASILY AVOIDED?	19
4.1 The conditionality policy as a way to ensure compliance and steer clear of DARIO article 14: the DRC	19
4.2 Jurisdictional immunity: denying responsibility and effective remedy in Haiti	24
4.3 DARIO article 7: 'effective control' – the correct threshold?.....	28
4.3.1 Effective control as understood in case-law	29
4.3.2 Difficulties with effective control in practice	31
5 WAYS TO ENSURE UN'S RESPONSIBILITY?.....	33

5.1	Conditionality policy	33
5.2	Jurisdictional immunity: how to secure access to effective remedy	34
5.2.1	Proper limits for the immunity of the UN.....	34
5.2.2	Other mechanisms to provide reparations.....	36
5.3	A more suitable test for attribution of conduct than ‘effective control’?	37
5.3.1	‘Ultimate authority and control’ as applied in the <i>Behrami</i> and <i>Saramati</i> cases	38
5.3.2	‘Overall control’ in the <i>Tadic</i> case.....	39
5.3.3	Dual or multiple attribution.....	40
5.3.4	A proper solution?.....	43
6	CONCLUDING REMARKS.....	43
7	BIBLIOGRAPHY	45

LIST OF ABBREVIATIONS

ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
CPIUN	Convention on the Privileges and Immunities of the United Nations
DARIO	Draft Articles on the Responsibility of International Organizations
DPKO	Department of Peacekeeping Operations
DRC	Democratic Republic of the Congo
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FARDC	Armed Forces of the Democratic Republic of the Congo
FDLR	Democratic Forces for the Liberation of Rwanda
FNL	Front National de Libération
HOM	Head of Mission
HRDDP	Human Rights Due Diligence Policy
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILA	International Law Association
ILC	International Law Commission
IO	International Organization
KFOR	NATO Kosovo Force
M23	March 23 Movement
MINUSTAH	United Nations Stabilization Mission in Haiti
MIPONUH	United Nations Civilian Police Mission in Haiti
MONUC	United Nations Mission in the Democratic Republic of the Congo
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of the Congo
MOU	Memorandum of Understanding
NATO	North Atlantic Treaty Organization
ONUC	United Nations Operations in the Congo
ONUVEH	Observer Group for the Verification of the Elections in Haiti
PO	Peace Operation
ROE	Rules of Engagement
SOFA	Status of Forces Agreement
TCC	Troop Contributing Country
TOA	Transfer of Authority
UN	United Nations
UNEF	United Nations Emergency Force

UNFICYP	United Nations Peacekeeping Force in Cyprus
UNMIH	United Nations Mission in Haiti
UNMIK	United Nations Mission in Kosovo
UNMOGIP	United Nations Military Observer Group in India and Pakistan
UNOCI	United Nations Operation in Côte d'Ivoire
UNOSOM II	United Nations Operation in Somalia II
UNSMIH	United Nations Support Mission in Haiti
UNTMIH	United Nations Transition Mission in Haiti
UNTSO	United Nations Truce Supervisory Organization
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

United Nations' Peace Operations (POs) have achieved many successes over the years. By, for example, helping conflicts come to an end, reconciling parties to conflicts, and helping with political elections in countries all over the world, the United Nations (UN) has "built up an impressive record of peacekeeping achievements over more than 60 years".¹ The UN has been most successful in POs in the areas of elections, communications after peace agreements and diplomacy.² Great achievements even led UN peacekeepers to win the Nobel Peace Prize in 1988. The press release stated that peacekeepers

"through their efforts have made important contributions towards the realization of one of the fundamental tenets of the United Nations. Thus, the world organization has come to play a more central part in world affairs and has been invested increasing trust."³

There have been 69 POs since the first one in 1948. The UN Truce Supervision Organization (UNTSO) in the Middle East and the UN Military Observer Group (UNMOGIP) have been stationed in India and Pakistan, since 1948 and 1949, respectively, and are still currently operating.⁴ Today, there are 16 ongoing POs⁵ and there are 8 high intensity and 20 medium intensity armed conflicts ongoing in the world.⁶ This shows the importance of peacekeepers and the UN as a promoter of international peace and security, and also that there are limitations on what to expect of POs seeing as there are more conflicts than there are operations.

1.1 Topic and research questions

International organizations (IOs) are increasingly involved in different activities from economic and environmental matters to international peace and security. While organizations have traditionally been seen as supporters of international law and human rights, due to the increased involvement in the various activities, IOs are becoming more likely to violate and weaken international law and human rights.⁷

¹ Source: <http://www.un.org/en/peacekeeping/operations/success.shtml> [Cited: 18 March 2015]

² Jacobson (2012), p.1

³ The Norwegian Nobel Committee, Press Release, 1988

⁴ Source: <http://www.un.org/en/peacekeeping/operations/current.shtml>

⁵ UNDPKO Fact Sheet at: <http://www.un.org/en/peacekeeping/resources/statistics/factsheet.shtml>

⁶ The International Institute for Strategic Studies, Armed Conflict Database at: <http://acd.iiss.org/> [Cited: 20 March 2015]

⁷ Reinisch (2001), p.131

Although the UN has had its successful operations, it has also had its unsuccessful ones, especially in the 1990s like in Somalia, Rwanda and the former Yugoslavia where civilians were massacred.⁸ The Brahimi Report, which analyzed the shortcomings of POs, admitted that “[n]o failure did more to damage the standing and credibility of United Nations peacekeeping in the 1990s than its reluctance to distinguish victim from aggressor.”⁹ In fact, the PO in Somalia was considered such a failure that the UN Commission of Inquiry concluded that “the UN should refrain from undertaking further peace enforcement actions within the internal conflicts of States”¹⁰

Questions have also arisen regarding the UN POs’ obligations to comply with international humanitarian law (IHL) and international human rights law (IHRL). During POs there have been incidents where peacekeepers have violated human rights and committed criminal offenses like sexual exploitation,¹¹ using excessive force resulting in the death of civilians,¹² and destruction of civilian property.¹³

Steps have been taken to try to address some of these difficulties. In 2000, the Brahimi Report made recommendations for a more effective system and more efficient POs. It noted, *inter alia*, the need for clear, credible and achievable mandates, effective mission leadership and properly equipped peacekeeping operations.¹⁴ It further noted that “traditional peacekeeping ... treats the symptoms rather than sources of conflict”.¹⁵ In 2005, the President of the General Assembly, Prince Zeid, addressed the issue of sexual exploitation by peacekeepers and made a report with strategies to eliminate future sexual exploitation and abuse.¹⁶ Furthermore, the Capstone Doctrine¹⁷ outlined important principles and guidelines for peacekeepers, such as the normative framework, the bedrock principles of peacekeeping, planning and establishing a peacekeeping operation and effective implementation of the mandate. Also, the Department of Peacekeeping Operations (DPKO) created a reform strategy, “Peace Operations 2010”¹⁸, to strengthen the management and conduct of POs. These reports and strate-

⁸ Jacobson (2012), pp.3-4

⁹ A/55/305-S/2000/809 (Brahimi Report), p.ix

¹⁰ S/1999/653, cited in S/1999/1257, p.41

¹¹ A/59/710, p.7, para 3

¹² Statement of the Spokesman for the UN Secretary-General at:
<http://www.un.org/sg/statements/index.asp?nid=8512> [Cited: 6 April 2015]

¹³ Letter from Secretary-General 20 February 1965, United Nations Juridical Yearbook (1965), Part One Chapter II, p.39; Reinisch (2001), p.132 and footnote 5, p.144

¹⁴ A/55/305-S/2000/809

¹⁵ *ibid.*, p.3

¹⁶ A/59/710

¹⁷ United Nations Peacekeeping Operations: Principles and Guidelines, UNDPKO, 2008 (Capstone Doctrine)

¹⁸ A/60/696, paras.6-21

gies were created to ensure the efficiency and the legitimacy of POs, as well as giving the personnel in the field clear guidelines to follow.

The increased focus on violations of IHRL and IHL has led to increased focus on who is responsible for such wrongdoing, and to which entity the conduct is attributable to. This led the *International Law Commission* (ILC) to develop its *Draft Articles on the Responsibility of International Organizations* (DARIO)¹⁹ drawing on the inspiration from the *Articles on Responsibility of States for Internationally Wrongful Acts* (ARSIWA).²⁰ When a State contributes armed forces to an organization, DARIO provides guidance about attribution of conduct and responsibility.

Furthermore, when the conduct and the breach of international obligations are attributed to the UN, the UN needs to accept responsibility in order to make reparations.²¹ This, as will be seen in relation to the cholera outbreak in Haiti, is not always the case.²² Additionally, the UN has jurisdictional immunity before national and international courts, which in turn leads to the lack of effective remedy for the victims. Violations of international law by IOs increase the need for accountability and a closer examination on the immunities granted to the UN before judicial entities, as well as how the conduct is attributed to the UN.

How the issues of attribution of conduct and responsibility are dealt with in theory is not always the same as in case-law. The judgments by the European Court of Human Rights (ECtHR) in the *Behrami* and *Saramati* cases²³, as well as the *Stichting Mothers of Srebrenica* case²⁴, and the criticism which the cases have attracted from scholars, show how the normative framework is not always followed by judicial entities.

The main question this thesis addresses is: What difficulties are there in holding the UN accountable for violations of international law in POs and how can they be overcome? This thesis will address three main difficulties: the UN's immunity, the UN's ability to adopt resolutions and policies, and how the threshold for attribution of conduct and the command and control system affect the possibility of holding the UN accountable.

The focus will be on the legal consequences for the UN for violations of international law in the context of UN authorized POs. How and to which entity the conduct should be attributed to, how this is shown in practice, and the threshold for the attribution of conduct will be evaluated. There remains uncertainty as regards to the content and application of the 'effective control' test, and whether dual or multiple attribution of conduct is possible, and the thesis will explore options to address these difficulties.

¹⁹ Adopted by the ILC at its sixty-third session in 2011, A/66/10

²⁰ Adopted by the ILC at its fifty-third session in 2001, A/56/10

²¹ DARIO articles 31, 34-37; Kondoch (2010), p.531

²² Chapter 4.4

²³ Chapter 5.3.1

²⁴ Application no.65542/12, *Stichting Mothers of Srebrenica and others against the Netherlands*, June 2013

1.2 Structure of the thesis

The first chapter of the thesis will explain the methodology used, some terms of importance in this thesis, and the development of DARIO. The second chapter will address the development of POs, their legal basis, the different types of POs and their command and control structure. In the third chapter I will turn to the material criteria for the UN to be held internationally responsible for wrongful acts. The focus of the thesis will be on how to ensure remedies for violations of international law and not the issue of what law is binding on the UN. Although I will briefly address the second issue, the discussion of international responsibility presupposes the presence of an internationally wrongful act.

The fourth chapter will take a closer look at some cases to see how the current normative framework and operative framework are deficient which creates a lack of accountability for the UN. Furthermore, the test for attribution of conduct will be analyzed: the content and application of effective control as well as the difficulties with the test in practice.

Chapter 5 will look at how these difficulties could be mended: how the conditionality policy could perhaps be interpreted and used to ensure compliance without making the peacekeepers ineffective in regards to their mandate, whether the immunity of the UN should be absolute, and whether there are other more suitable tests for the attribution of conduct rather than ‘effective control’. Finally, chapter 6 will contain some concluding remarks.

1.3 Methodology

This thesis will describe the legal rules for the UN to become responsible for its peacekeepers, and then I will look at the deficiencies with the normative framework and how the law possibly should be. The discussion of what the law is will be separated from what it should be. For scholars belonging to legal positivism, international law consists of rules the states have given their consent to.²⁵ It has been stated that “[w]hat passes for method ... has to do with what counts as persuasive arguments in international law.”²⁶ Furthermore, “whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits”.²⁷ The law will be described by relying on formal criteria and sources. Therefore, the sources recognized in international law are of importance.

The sources for assessing the questions posed in this thesis will follow the sources listed in article 38 of the ICJ Statute which is considered to be the “most authoritative and complete statement as to the sources of international law”.²⁸ Article 38 provides that interna-

²⁵ Ratner (2004), p.5

²⁶ Koskeniemi (2007)

²⁷ Gardner (2001), p.199

²⁸ Shaw (2008), p.70

tional conventions, international customary law and general principles of international law are the primary sources of law, while judicial decisions and theory are secondary sources.

International laws and texts will be read in the light of the principles found in the Vienna Convention on the Law of Treaties (VCLT)²⁹, especially articles 31 and 32 which lay down rules for interpreting international texts.

When establishing a PO, several agreements are entered between the UN and troop contributing countries (TCC) and the host state. The question arises as to whether such agreements are treaties as defined in the VCLT³⁰ and should therefore be interpreted the same way as other international treaties. Treaties are different from other agreements seeing as treaties are “governed by international law”³¹ whereas other types of agreements are not legally binding, or governed by another legal system. Therefore, agreements between the UN and member states will be viewed as treaties and will be interpreted in accordance with the principles found in the VCLT.

Other UN documents such as reports and statements are not legally binding on member states but are rather political obligations. However, these obligations give weight to the sources. Additionally, these documents show how the UN is complying with its obligations, evaluations of contemporary issues, and they can demonstrate how the UN is able to adopt policies to evade responsibility.

Case studies will be used to evaluate how the issue of responsibility has worked in practice, and the difficulties with it. The cholera incident in Haiti will demonstrate the need to evaluate the immunity granted to the UN. And the conditionality policy adopted in relation to MONUC’s activity in the Democratic Republic of the Congo (DRC) shows how leverage over a host state to comply with international law can also be a way to avoid responsibility. Lastly, an analysis of ‘effective control’ as the threshold for attribution of conduct will show whether the threshold is too high to attribute the conduct of peacekeepers to the UN thereby not causing responsibility, or whether it is in fact the appropriate solution.

1.4 Definitions and distinctions

Throughout this thesis terms such as responsibility, accountability, attribution of conduct and attribution of responsibility will be used. It is important to separate these terms from each other as they have different meanings.

1.4.1 Responsibility, accountability and liability

The thesis examines how to hold the UN responsible, and how this might be more difficult in practice than in theory. Therefore, it is important to define what is meant by international le-

²⁹ Vienna Convention on the Law of Treaties, United Nations, Treaty Series, vol. 1155, p.331

³⁰ *ibid.*, article 2.1(a)

³¹ *ibid.*

gal responsibility. Traditionally, legal responsibility occurred when “there arises an Obligation by the Law of Nature to make Reparation for the Damage, if any be done”³² in response to an injury. Injury was a condition to entail responsibility. However, today, international responsibility has been defined as “legal consequences arising from wrongful acts or omissions” and is “part of the broader concept of international accountability for wrongful acts”.³³ According to this definition, no injury is needed to become responsible – the breach of the international obligation is sufficient.

Turning to accountability, the International Law Association (ILA) has addressed this concept, stating that it is “the duty to account for its exercise”³⁴ and that it consists of three levels. The first level is “internal and external scrutiny and monitoring, irrespective of potential and subsequent liability and/or responsibility”, while the second level is “tortious liability for injurious consequences arising out of acts or omissions not involving a breach of any rule of international and/or institutional law”. Finally, the third level is “responsibility arising out of acts or omissions which do constitute a breach of a rule of international and/or institutional law.”³⁵ The focus of this thesis will be on international responsibility at the third level of accountability.

While legal responsibility is, by its own definition, legal, accountability can be legal, political, administrative or financial.³⁶ Therefore, accountability of IOs “is not limited to international obligations binding on those organizations.”³⁷ This means that accountability is broader than international legal responsibility.

The term ‘liability’ is often used interchangeably with responsibility but there is support for understanding liability as an obligation to provide reparation when there has been a breach of international law.³⁸ This is the way the term will be used throughout this thesis.

1.4.2 Attribution of conduct versus attribution of responsibility

DARIO distinguishes between attribution of conduct and attribution of responsibility. Whereas chapter II of DARIO part two concerns attribution of conduct, part five implicitly deals with attribution of responsibility. Since DARIO has separate chapters for attribution of conduct and attribution of responsibility, it suggests that there is a distinction between the two

³² Grotius (1625), cited in Pellet (2010), p.5

³³ Kondocho (2010), p.515

³⁴ ILA, Final Report on Accountability of International Organizations, 2004, p.5

³⁵ *ibid.*

³⁶ *ibid.*

³⁷ Zwanenburg (2005), p.63

³⁸ Nollkaemper (2011), pp.88-89

concepts.³⁹ Furthermore, attribution of conduct is an element in an internationally wrongful act of an IO.⁴⁰

Attribution of conduct has been described as “a legal operation, addressing the factual link between the conduct and the state or international organization through a normative approach”.⁴¹ The ILC laid down “effective control” in DARIO article 7 as being the appropriate threshold for attribution of conduct of state organs temporarily placed under IOs.

It has been explained that “attribution of responsibility involves independent acts of multiple parties causing a collective injury, whereas attribution of conduct often but not necessarily, will involve the situation of a single wrongdoer.”⁴² Whether there is a possibility for multiple attribution of conduct will be examined. Organizations can also be responsible for the conduct of its member states. As Gaja stated: “It may well be that an organization undertakes an obligation in circumstances in which compliance depends on the conduct of its member states.”⁴³

1.5 Draft Articles on the Responsibility of International Organizations

After completing its work on ARSIWA in 2001, in 2002 the ILC turned to the law on responsibility for IOs, with Giorgio Gaja as the Special Rapporteur.⁴⁴ The work, known as DARIO, was completed in 2011.

1.5.1 Codification or progressive development? Resemblance to ARSIWA.

According to article 1 of the ILC Statute,⁴⁵ the ILC’s work should focus on either codifying international law or promote the progressive development of it. Article 15 of the ILC Statute explains that:

“In the following articles the expression “progressive development of international law” is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression “codification of international law” is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.”

³⁹ Fry (2014), p.104

⁴⁰ DARIO article 4

⁴¹ Fry (2014), p.106

⁴² *ibid.*, p.104

⁴³ A/CN.4/541 (2004), para.11

⁴⁴ A/57/10 (2002)

⁴⁵ Adopted by the General Assembly in resolution 174 (II) of 21 November 1947

The distinction between codification and progressive development can be difficult to maintain since there may be uncertainty as to whether a rule already existed or was developed in the process.⁴⁶ The ILC noted the lack of practice regarding responsibility for organizations, thus making DARIO more a document of progressive development rather than codification of existing norms.⁴⁷

DARIO follows the same approach as ARSIWA, however DARIO is an “autonomous text” meaning that the articles in DARIO have been studied from the perspective of IOs even though the wording and approach is similar to ARSIWA.⁴⁸ As Gaja explained: “[t]he articles on the responsibility of international organizations are not based on any presumption that the rules on the responsibility of States for internationally wrongful acts are generally applicable to international organizations” but “a certain number of rules have been considered by the Commission to apply both to States and international organizations.”⁴⁹

DARIO is meant to be general and applicable to all IOs even though there are considerable differences between IOs in terms of functions and activities carried out. However, some articles are more relevant to certain organizations. DARIO article 21 on self-defense as a circumstance precluding wrongfulness may apply to a few organizations depending on their functions.⁵⁰ Self-defense and necessity would be especially important to the UN during POs.

1.5.2 Three sets of rules regarding attribution of conduct

Messineo explains that the attribution of conduct to IOs, “rests on three basic pillars”. These are rules concerning “institutional links”, “factual links” and that a state or an organization “may adopt a certain conduct as its own after the conduct has taken place.”⁵¹

The rules regarding the institutional links concern organs or persons whose conduct is attributed to the state or organization automatically. This will be, for example, state organs and the organization’s organs⁵², or organs “exercising IO functions”.⁵³ If there are such institutional links before the conduct is carried out, the conduct, even *ultra vires* conduct⁵⁴, will be attributed to the state or organization. Although the conduct will automatically be attributed to the organization, off-duty and private conduct will not be.

⁴⁶ Murphy (2013), p.31

⁴⁷ DARIO commentaries p.2

⁴⁸ *ibid.*

⁴⁹ Gaja (2014), p.4

⁵⁰ *ibid.*, p.3

⁵¹ Messineo (2012), pp.7-10

⁵² DARIO article 6; ARSIWA article 4

⁵³ Messineo (2012), p.8; DARIO article 6

⁵⁴ DARIO article 8

The rules concerning factual links are when a person “is acting under the instructions, direction or control of a state/IO”.⁵⁵ The conduct will be attributed to that organization if the instructions are given by an agent institutionally linked to it. The control or direction must be “effective” for the conduct to be attributed to the organization.⁵⁶ The meaning of the term ‘effective’ will be addressed later in the thesis.

Lastly, attribution of conduct to an organization or a state can happen when the organization or state adopts “a certain conduct as its own after the conduct has taken place (ex post facto)”.⁵⁷ The conduct must be approved by an official of the state or the organization in order for it to be considered adopted.

1.6 Assessing international responsibility

DARIO article 3 states that “Every internationally wrongful act of an international organization entails the international responsibility of that organization.” International responsibility can be defined as the “legal consequences arising from wrongful acts or omissions”.⁵⁸ The wrongful act must be a breach of an international obligation.

According to the commentaries to DARIO article 1, the organization will be responsible for internationally wrongful acts it commits, and if the organization assists or aids another organization or a state in conducting an internationally wrongful act.⁵⁹ It is questionable whether the UN can, for example, be seen as an accomplice to the Congolese forces when they have committed internationally wrongful acts and the peacekeepers have a mandate to assist the government.⁶⁰ Therefore there are two types of responsibility: direct responsibility when the UN and its peacekeepers commit breaches of international law, and indirect responsibility when the UN aids or assists others in breaching international law.

Accountability for IOs is important to make sure victims are acknowledged and can be compensated for the offenses they have experienced. The UN has admitted responsibility for its peacekeepers. The first time was in relation to the UN Operations in the Congo (ONUC) when the Secretary-General settled claims with Belgium and other states as compensation to their respective nationals who had suffered damage.⁶¹ Also, the UN accepted responsibility for an accident that happened to a British helicopter in Cyprus at the disposal of UNFICYP,

⁵⁵ Messineo (2012), p.8

⁵⁶ DARIO article 7

⁵⁷ Messineo (2012), p.10; DARIO article 9; ARSIWA article 11

⁵⁸ Kondocho (2010), p.515.

⁵⁹ DARIO commentaries, p.4

⁶⁰ Chapter 4.1

⁶¹ Letter from Secretary-General 20 February 1965, United Nations Juridical Yearbook (1965), Part One Chapter II, p.39; A/CN.4/SER.A/2004/Add.1 (Part 1), p.11, para.35

and it was stated that “third-party claims should normally be expected to be addressed to the United Nations.”⁶²

Although DARIO lays down rules for responsibility and attribution of conduct, and the UN has accepted responsibility in the past, it is not always easy to assess responsibility in practice. This is evident in relation to POs which have a complicated command and control structure.

2 Peace operations

There is no official definition of POs. Although the UN Charter (Charter) does not mention POs explicitly, the preamble to the Charter and article 1 state that one of the purposes of the UN is to “maintain international peace and security”.⁶³ This is to be achieved by taking “effective collective measures for the prevention and removal of threats to peace”.⁶⁴ This, combined with the development and use of POs, provide the operations with the necessary legality.

2.1 Development of peace operations

POs are operations mandated by the UN Security Council, or by a regional organization acting in compliance with the Charter. Troops are contributed to the operations by member states on a voluntary basis.

The legal basis of POs lies implicitly in the Charter, customary law and consent (in operations that have the consent of the host state). The purposes of POs are to promote, maintain and restore international peace and security. The ICJ confirmed the legality of POs in the *Certain Expenses of the United Nations* advisory opinion.⁶⁵ The ICJ stated that “when the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the Organization.”⁶⁶ The ICJ’s findings and the interpretation of the Charter provide sufficient basis for the legality of POs.

Over the decades, the number of POs increased as have the number of responsibilities which they undertake. The first peacekeeping operation, UNTSO, was established to monitor ceasefires and prevent hostilities.⁶⁷ These peacekeepers were unarmed, meant to observe only, and were seen as peacekeepers in the traditional sense.

⁶² United Nations Juridical Yearbook (1980), pp.184-185, cited in Gaja, Second Report 2004, p.11

⁶³ Charter article 1

⁶⁴ *ibid.*

⁶⁵ *Certain expenses of the United Nations* (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962: I.C.J. Reports 1962, p.151

⁶⁶ *ibid.*, p.168

⁶⁷ S/Res/50 (1948)

The first time that armed military personnel were used in a peacekeeping operation was in the first UN Emergency Force (UNEF 1) in Egypt.⁶⁸ The use of armed military personnel raised the question of the lawfulness of the use of force in self-defense, and the model of the use of force only in self-defense, which was developed in UNEF, served as a model for operations to come. From UNEF, the norm of self-defense changed from a strict understanding of the term to “defense of the mission”.⁶⁹ Furthermore, the mandates of POs have become more ambitious and all-inclusive: from, for example, strictly monitoring the truce between Israel and Arab states in UNTSO, to undertake humanitarian activities as in Cyprus (UNFICYP)⁷⁰, and to monitor elections as in Côte d’Ivoire (UNOCI).⁷¹

The increased use of force as self-defense was developed in operations such as the first major peace enforcement operation in Congo (ONUC)⁷², to UNFICYP and Lebanon.⁷³ Troops were authorized to use force in situations other than situations of strict self-defense. While peacekeeping operations were meant to deal with inter-State conflicts, today, UN peacekeeping “has been increasingly applied to intra-State conflicts and civil wars.”⁷⁴ This challenges the founding principle of impartiality. The increased use of force and the expansion of mandates, tasks and duties have also increased the potential for transgressions committed by peacekeepers and therefore the increased need for rules for international responsibility as well as effective remedies.

2.2 Different categories of peace operations

There are different types of POs. One can make a distinction between enforcement and peace enforcement operations on one hand, and peace operations on the other. While the former operations are meant to enforce the will of the international community and are not dependent upon consent, the latter operations are based upon the principles of consent, impartiality and limited use of force.⁷⁵

2.2.1 Enforcement and peace enforcement operations

Enforcement and peace enforcement operations are operations mandated by the Security Council under chapter VII of the Charter. These operations are “intended and mandated to

⁶⁸ UN General Assembly Resolution 1000 (ES-1), 5 Nov. 1956

⁶⁹ Findlay (2002), p.19

⁷⁰ S/Res/186 (1964)

⁷¹ S/Res/1528 (2004)

⁷² S/Res/143 (1960)

⁷³ S/Res/425 (1978) and S/Res/426 (1978)

⁷⁴ Source: <http://www.un.org/en/globalissues/peacesecurity/> [Cited: 16 March 2015]

For a list of past and current operations: <http://www.un.org/en/peacekeeping/operations/>

⁷⁵ Gill (2011), p.42.

impose the will of the international community ‘by all necessary means’ on the other”.⁷⁶ Furthermore, these operations are not governed by the principles that govern peacekeeping operations.

Enforcement and peace enforcement operations do not require the consent of the main parties, and may use force, which is normally prohibited under article 2(4) of the Charter.⁷⁷ However, whereas enforcement operations are in a way “UN mandated war-fighting operations designed to impose a military solution” in response to breaches of international peace, peace enforcement operations are not so “far-reaching in terms of its objectives or involvement in an armed conflict”⁷⁸ and will “seek to maintain the maximum consent”⁷⁹ of the parties to the conflict. These types of operations are often conducted under the command of a State on the basis of a UN mandate.

2.2.2 Peacekeeping operations

Peacekeeping operations are often mandated under Chapter VI of the Charter and often lead by the UN itself. However, it has become increasingly common for peacekeeping operations to be mandated under chapter VII.⁸⁰ Peacekeeping operations rely upon the principles of consent; impartiality; and limited use of force.⁸¹ The three principles are “inter-related and mutually reinforcing”⁸² and will be examined in turn.

Firstly, consent: Consent of the host state is important to make peacekeeping operations as successful as possible, and make it easier for peacekeepers to perform their mandated duties. Without consent it is difficult to see peacekeepers as impartial, and they might be seen as a party to the conflict. The consent of the TCCs is also important and can be withdrawn at any point, the same would be possible for the host state.

Secondly, impartiality: The principle of impartiality is of crucial importance to gain the trust of the parties to the conflict and to maintain their consent. The peacekeeping forces “must implement their mandate without favour or prejudice to any party” but should not be “neutral in the execution of their mandate.”⁸³ Impartiality differs from inactivity or neutrality. While neutrality means “to take no sides in hostilities or engage, at any time, in controversies of a political, racial, religious or ideological nature”, impartiality means “being guided solely

⁷⁶ *ibid.*, p.41

⁷⁷ Capstone Doctrine, pp.34-35

⁷⁸ Gill (2011), p.42

⁷⁹ Gill (2010), p.135

⁸⁰ Gill (2011), p.44

⁸¹ *ibid.*, p.42

⁸² Capstone Doctrine, p.31

⁸³ *ibid.*, p.33

by needs, making no discrimination on the basis of nationality, race, gender, class or religious/political beliefs”.⁸⁴

Thirdly, limited use of force, which means that peacekeepers should not use force, unless it is in self-defense, or in the defense of the mandate.⁸⁵ The duties of the peacekeepers have expanded since the first peacekeeping operation, and as mentioned, the lawfulness of the use of force has expanded through POs over time. However, the use of force should always be a last resort.

In situations where peacekeepers are in presence of rebels, militias or other threats, the Security Council has given a so-called “robust” mandate authorizing the use of “all necessary means” to prevent forceful attempts to disturb the peace and to protect civilians.⁸⁶ Although given a robust mandate, peacekeeping operations are separate from peace enforcement operations mandated under chapter VII of the Charter.

2.3 Creation of a peace operation

The Security Council has the primary responsibility for maintaining international peace and security,⁸⁷ and decides when to establish a PO on an ad hoc basis. The Security Council evaluates the situation, and determines, for example, if it is a threat to international peace and security, the existence of a cease-fire, whether the parties commit to a peace process, the safety of UN personnel, and whether a precise mandate can be expressed.⁸⁸ Establishing a PO can take a long time, however the success and credibility of the operation may depend on rapid deployment.⁸⁹

The Secretary-General will prepare a report based on consultations with Member States and the potential host state as well as analyses of the territory of security, politics, humanitarian issues, and implications of the possible operations.⁹⁰ The Security Council will then evaluate and decide if an operation should be established. Each operation has its own mandate, and the Security Council Resolution will provide the legal basis and the framework.

Since the UN does not have its own armed force, it is reliant on voluntary troop contributions from member states. Prior to the deployment, the UN and the TCCs agree to a Memorandum of Understanding (MOU) or a formal Transfer of Authority (TOA) agreement.

⁸⁴ Capstone Doctrine, p.43, note 22

⁸⁵ *ibid.*, p.34

⁸⁶ *ibid.*

⁸⁷ Charter article 24(1)

⁸⁸ Capstone Doctrine, p.47.

⁸⁹ *ibid.*, p.38.

⁹⁰ *ibid.*, pp.48-49

The TOA or MOU will define the level of authority transferred to the UN, typically operational command and/or control.⁹¹

When the operation relies on host state consent, the UN enters a Status of Forces Agreement (SOFA) with the host state. This agreement is the basis for the immunity of individual peacekeepers and will regulate the legal relationship between the peacekeepers and the host state. Furthermore, the SOFA clarifies that the TCCs will retain criminal jurisdiction over its contingents.⁹²

2.4 Command and control in peace operations

The power to exercise authority over and direct the actions of armed forces is related to command and control.⁹³ The highest level of decision-making and management lies with the Security Council and the Department of Peacekeeping at the UN Headquarters. It is here that decisions are made at a strategic level.

Underneath is the operational level, which is comprised of the management at the Mission's Headquarters. It is here that objectives and plans from the strategic level are formulated into plans for operating in the field. The UN has defined 'operational control' as:

“The authority granted to a military commander, in United Nations Peacekeeping Operations, to direct forces assigned so that the commander may accomplish specific missions or tasks which are usually limited by function, time, or location (or a combination), to deploy units concerned and/or military personnel ... United Nations Operational Control includes the authority to assign separate tasks to sub units of a contingent, as required by the operational necessities, within the mission area of responsibility, in consultation with the Contingent Commander and as approved by the United Nations Headquarters.”⁹⁴

The UN Force Commander has operational command and control over the entire Force and answers to the Head of Mission (HOM) who is in charge of conducting the mission.

The daily management of the operations below the Mission Headquarters is the tactical level of command and control. At the tactical level, command and control relate to the detailed “direction and control of movements” to carry out specific duties.⁹⁵ The TCCs still have tactical control and command but will designate a tactical level commander who will be a representative for the TCC and exercise tactical control and command over the contingents

⁹¹ Gill (2011), p.48

⁹² UN Model SOFA 47b.

⁹³ Gill (2011), p.45

⁹⁴ Ford (2004) p.153 cited in Leck (2009) p.8

⁹⁵ Gill (2011), p.49

from the TCC in question.⁹⁶ This means that the command and control (“C2” in military terms) is structured as a hierarchy; national contingents, lead by a national contingent commander, are under the command of the UN representatives in the field. The commander in chief is under the command and control of the Secretary-General who is under the Security Council on top of the hierarchy.

There are several components in the field in UN peacekeeping operations: military, police and civilian. These components are under the operational authority of the HOM.⁹⁷ The HOM will typically be a Special Representative of the Secretary-General and a Force Commander. The Force Commander works as a link between the national contingents and the UN⁹⁸, and has the operational control over the peacekeepers from the TCCs, while the TCC will keep full command. Full command means the authority to determine whether armed forces will participate in an operation, and to withdraw from the operation.⁹⁹

In *enforcement or peace enforcement operations*, the Security Council will lay out the objective of the operation in the mandate and delegate the operational level command to a specific state or organization while still retain the overall political authority and responsibility.¹⁰⁰ Whereas, in *peacekeeping operations*, the TCCs retain full command over its armed forces but will transfer authority at the level of operational command or control to the UN.¹⁰¹

The UN may exercise operational level command but this does not mean actual authority or responsibility for acts by armed forces. As stated “[i]t should be remembered that the multilayered levels of authority range from the general to the specific and simply because a particular act or failure to act is carried out under UN Security Council mandate does not signify that it is an act attributable to the UN.”¹⁰²

3 Criteria for international responsibility for the UN

In order for the UN to be held responsible for an internationally wrongful act, several criteria must be fulfilled. Shaw states that “[r]esponsibility is a necessary consequence of international personality”.¹⁰³ Therefore, the first criterion is that the UN must possess a legal personality in international law separate from its Member States. Second, there must be a breach of an international obligation.¹⁰⁴ Lastly, the conduct in question must be attributable to the UN.¹⁰⁵

⁹⁶ *ibid.*

⁹⁷ Capstone Doctrine p.68

⁹⁸ Dannenbaum (2010), p.144

⁹⁹ Gill (2011), p.46

¹⁰⁰ *ibid.*, p.47

¹⁰¹ *ibid.*, p.48

¹⁰² *ibid.*, p.51

¹⁰³ Shaw (2008), p.1311

¹⁰⁴ DARIO article 4(b)

These criteria will be explored in more detail.

3.1 The UN's legal personality

According to Brownlie, international responsibility is a “question inseparable from that of legal personality in all its forms”.¹⁰⁶ Thus, whether or not the UN has a legal personality is essential if it is to be held responsible for its actions.

This question was considered in the *Reparations for Injuries Advisory Opinion*¹⁰⁷, where the ICJ found that the UN possesses legal personality and thus has rights and duties under international law. In this Advisory Opinion the personality was “inferred from the powers or purposes of the organization and its practice”.¹⁰⁸ Without legal personality, the UN would not be able to achieve its purpose and goals.

Peacekeeping operations as subsidiary organs of the Security Council which functions as the mandating organ, also have legal personality.¹⁰⁹ Furthermore, in the *Cumaraswamy Advisory Opinion*, the ICJ stated that the UN can be held responsible for internationally wrongful acts and can be required to pay compensation.¹¹⁰ This is considered to be customary international law.¹¹¹ According to the UN Secretariat, the UN's legal personality will, in principle entail responsibility for any violations of international law committed by UN peacekeepers as a subsidiary organ for the UN.¹¹²

3.2 Breach of an international obligation

The second criterion for responsibility is that there has been a breach of an international obligation through an act or an omission.¹¹³ For an omission to be a violation of international law, there must be a *duty to act* which the organization has not fulfilled.¹¹⁴ On the other hand, a breach of an international obligation through an act is therefore a violation of an obligation *not* to act or not to act in that particular way.¹¹⁵ An example of an omission is the *Genocide case*¹¹⁶ where Serbia, through omissions, was found by the ICJ to have violated the duty to

¹⁰⁵ DARIO article 4(a)

¹⁰⁶ Brownlie (2008), p.433

¹⁰⁷ *Reparation for Injuries*, ICJ Reports, 1949, p.174

¹⁰⁸ Shaw (2008), p.1297

¹⁰⁹ Gill (2011), p.52

¹¹⁰ Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999, p. 62, paras.66-67.

¹¹¹ ILA, Final Report on Accountability of International Organizations, 2004, p.26

¹¹² A/CN.4/545 (2004), p.28.

¹¹³ DARIO article 4

¹¹⁴ Latty (2010), p.357

¹¹⁵ *ibid.*, p.356

¹¹⁶ Application of the Convention for the Prevention and Punishment of the Crime of Genocide, (Bosnia-Herzegovina v Serbia and Montenegro), Judgment, I.C.J Reports, 2007, p.43

prevent genocide at Srebrenica. The cholera epidemic in Haiti can be seen as a breach of the do no harm principle,¹¹⁷ but also as a failure to exercise due diligence to prevent possible epidemics.

While rules regarding the different international obligations are referred to as primary rules, the consequences of breaching these rules are known as the secondary rules.¹¹⁸ International obligations can result from customary international law, treaties binding the organization, or other obligations in international law binding on IOs. The ICJ stated that organizations “are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties”.¹¹⁹

UN peacekeeping forces are seen as subsidiary organs of the UN – either of the Security Council or the General Assembly. This raises the question of whether IHL and IHRL apply to peacekeeping forces. Despite having international legal personality, the UN is not a party to any IHL or IHRL conventions. However, it is “not difficult to apply customary rules of IHL since such rules are binding on all states and therefore, all states participating in UN forces are in any case bound by them.”¹²⁰

IHL will, as a rule, apply in enforcement operations¹²¹, but when it comes to peace enforcement or peacekeeping operations it will be “determined on a case-by-case basis in the light of the factual environment and the operationalization of the mandate for the operation in question within that environment.”¹²² Furthermore, the UN considers IHL applicable to “United Nations forces conducting operations under United Nations command and control”.¹²³ The applicability of IHL conventions is confirmed in several SOFAs and the UN Model Agreement between UN and TCCs.¹²⁴ This combined with other official UN documents and reports make it clear that IHL conventions are applicable to UN forces.¹²⁵ When there is an armed conflict as defined in common articles 2 and 3 of the Geneva Conventions of 1949 and article 1 of Additional Protocols I and II of 1977, IHL will apply.

Since the beginning of peacekeeping operations, peacekeeping troops have been expected to protect civilians from massacres and crimes against humanity.¹²⁶ Unfortunately, these expectations have not always been met. After the failure of peacekeepers to protect civilians in the 1990s during the massacres in Rwanda and Bosnia, the Security Council adopt-

¹¹⁷ “Peacekeeping without Accountability”, p.47

¹¹⁸ DARIO commentaries p.2(3)

¹¹⁹ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* Advisory Opinion, para.37

¹²⁰ Okimoto (2003), pp.204-205

¹²¹ Kleffner (2010), p.60

¹²² *ibid.*

¹²³ ST/SGB/1999/13

¹²⁴ Okimoto (2003), pp.205-206

¹²⁵ *ibid.*, p.207

¹²⁶ Wills (2009), p.84

ed a resolution on the Protection of Civilians in Armed Conflict where it expressed the “willingness to consider how peacekeeping mandates might better address the negative impact of armed conflict on civilians”.¹²⁷ Since this resolution, the protection of civilians has been explicitly mentioned in peacekeeping mandates, although it is stated as being the responsibility of the host State’s government.¹²⁸

Even if the mandate of a peacekeeping operation does not contain an express provision regarding the protection of civilians, “peacekeepers ... who witness violence against civilians should be presumed to be authorized to stop it, within their means, in support of basic United Nations principles”.¹²⁹ In order to protect civilians, the peacekeepers should “be given the specific resources needed to carry out that mandate.”¹³⁰ This has been acknowledged by the Security Council.¹³¹ Despite having an obligation to protect civilians, even if it requires peacekeepers to use force, “[t]here is a persistent pattern of peacekeeping operations not intervening with force when civilians are under attack.”¹³² Peacekeepers use force to protect civilians when it is also used as self-defense of the peacekeepers themselves or UN property.¹³³ This can damage the effectiveness of a peacekeeping mission if they fail to protect the local population.¹³⁴

Human rights is an important issue at the UN. The UN cannot become a party to human rights treaties. However, it is nevertheless bound by customary human rights law due to its international legal personality.¹³⁵ Furthermore, “[a]ll staff in peace operations have the responsibility to ensure the protection and promotion of human rights through their work.”¹³⁶ Human rights are often mentioned in peacekeeping mandates. For example, the mandate to the peacekeeping operation in the DRC, stated that the operation was to “ensure protection of civilians” and to “assist in the promotion and protection of human rights”.¹³⁷

3.3 The conduct is attributable to the UN

Lastly, for the UN to be internationally responsible, the wrongful act must be “attributable to” the UN.¹³⁸ The test of attribution of conduct in question is “effective control” as specified in

¹²⁷ S/Res/1265 (1999)

¹²⁸ Wills (2009), p.66

¹²⁹ Brahimi Report, p.11, para.62

¹³⁰ *ibid.*, p.11, para.63

¹³¹ S/Res/1894 (2009), paras.19-20

¹³² A/68/787 (2014), paras.13-16

¹³³ *ibid.*, para.23

¹³⁴ Willis (2009), p.283

¹³⁵ Kleffner (2010), p.67

¹³⁶ Source: <http://www.un.org/en/peacekeeping/issues/humanrights.shtml> [Cited: March 9th 2015]

¹³⁷ S/Res/1856 (2008), paras. 3(a), 4(c)

¹³⁸ DARIO article 4

DARIO article 7, which provides that:

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.¹³⁹

As I will explain, the level of command and control remaining with the TCCs might make it problematic for the UN to actually exercise “effective control” over POs, depending on how “effective control” is defined and understood. If the UN does not have effective control over the conduct, it cannot be attributed to the UN and therefore the UN will not bear responsibility.

Moreover, DARIO article 8 states that in order for the acts to be attributable to the UN, the acts must have been performed while acting “in an official capacity and within the overall functions of that organization”.¹⁴⁰ Article 8 also states that *ultra vires* acts, meaning acts exceeding the authority of the agent or organ, under the official capacity of the organization will still be attributable to the organization.

4 International responsibility for the UN: easily avoided?

In theory, it should be easy to hold the UN responsible: the UN has legal personality and when it has effective control over conduct that is in breach of an international obligation – the UN is responsible and obligated to make reparations. However, in practice, it is not as easy as it seems. The UN has the ability to adopt policies to ensure its own compliance with international law, but the policies can also be seen as a way to evade responsibility. Furthermore, the UN has jurisdictional immunity and can therefore, even if being considered responsible, avoid any obligations to make reparations. Lastly, the threshold for attribution of conduct, as currently construed, is perhaps not the best test since the command and control structure can interfere with UN’s effective control over its peacekeepers.

4.1 The conditionality policy as a way to ensure compliance and steer clear of DARIO article 14: the DRC

The UN promotes international peace, security and human rights. The UN does not want to violate international law by aiding or assisting an internationally wrongful act thereby being an accomplice which will negatively affect the UN’s credibility. The UN’s ability to adopt resolutions and policies can be used as leverage to steer states in the right direction. However,

¹³⁹ DARIO article 7

¹⁴⁰ DARIO article 8

this ability can also enable the UN to avoid being held responsible.

DARIO chapter IV regards responsibility for organizations “in connection with the act of a State or another international organization”. DARIO article 14 is therefore a rule regarding dual attribution of responsibility and not one of attribution of conduct. If the peacekeepers carry out unlawful acts themselves, then that will raise the issue of attribution of conduct to the organization or the TCCs, therefore being a question of direct responsibility. This, however, is when the peacekeepers help others carry out unlawful acts without taking part in the conduct themselves. As seen in chapter 1.6 of this thesis, this is indirect responsibility.

DARIO article 14 provides that:

“An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:

(a) the organization does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that organization.”

If these two cumulative criteria are met – the UN will be considered internationally responsible. DARIO article 14 closely resembles ARSIWA article 16, which is considered to be customary international law.¹⁴¹ DARIO article 14 is also meant to represent customary law.¹⁴²

According to DARIO article 14(b), the UN would have to be bound by the same rule as the main actor in order to be considered responsible. For example, the DRC is bound by IHL and IHRL as it is a party to the 1949 Geneva Conventions, their two Additional Protocols, and has ratified most of the human rights treaties¹⁴³ and is also bound by international customary law. As explained, the UN is bound by IHL and IHRL so in the case of peacekeeping in the DRC, this criteria would be fulfilled since the UN is bound by the same obligations as the DRC. Additionally, peacekeepers must comply with local laws and regulations which include international obligations of the DRC.¹⁴⁴

Additionally, the wording of article 14(b) shows that an act is required for responsibility to be attributed to the UN. The criteria in article 14(b) will not be fulfilled if the peacekeepers aid or assist someone who has committed war crimes in the past. Only if the peacekeepers assist in actual conduct of an internationally wrongful act will it entail responsibility.

The requirement of “knowledge” as stated in article 14(a) is a subjective criterion.

¹⁴¹ Genocide case, para.420

¹⁴² Aust (2014), pp.8-9

¹⁴³ Source: http://www.geneva-academy.ch/RULAC/international_treaties.php?id_state=178 [Cited: 18 March 2015]

¹⁴⁴ UN Model SOFA 6.

The ILC refers to the commentary for ARSIWA article 16 which states that it is the intent to “facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State”.¹⁴⁵ This criterion has been criticized and debated in literature seeing as the intent is impossible to prove.¹⁴⁶ The commentaries also explain that the aid or assistance should be significant in order to entail responsibility.¹⁴⁷ The condition of the aid or assistance being significant has been questioned. What would amount to significant assistance? Should it not be sufficient that the organization is assisting or aiding at all?¹⁴⁸ The aid or assistance, fulfilling the criteria of knowledge, should be wrongful in itself. Therefore, if the UN exercises effective control over a PO which aids or assists a state or another organization in committing an internationally wrongful act, the conduct can be attributed to the UN and therefore also responsibility.

As many peacekeeping operations have developed from traditional monitoring to be given the mandate to use all necessary means to achieve its purpose, the protection of civilians has now become “part of the core obligations within peacekeeping missions.”¹⁴⁹ For a PO to be successful and seem legitimate, protecting civilians is of crucial importance. Although the main responsibility of protecting civilians is with the parties to the conflict,¹⁵⁰ the civilians expect to be protected when there is a PO in the area. Therefore it is important that the peacekeepers are considered impartial and not as an accomplice to attacks on the civilian population.

After belonging to Belgium for many years, Congo became independent in 1960 and has since then been troubled by several conflicts. The first UN operation in Congo (ONUC) was established in 1960 and lasted for four years. Initially, ONUC was meant to ensure the withdrawal of Belgian forces and provide assistance¹⁵¹ but the mandate was expanded to prevent civil war, maintain Congo’s independence and authorized ONUC to use force as a last resort to achieve its mandate.¹⁵²

In 1999 another PO was established, the UN Mission in the Democratic Republic of the Congo (MONUC).¹⁵³ The mission was intended to monitor the Lusaka Ceasefire Agreement between the DRC, Angola, Namibia, Rwanda, Uganda and Zimbabwe but over time the Security Council expanded the mandate. With a chapter VII mandate, MONUC has the au-

¹⁴⁵ DARIO commentaries p.37, para (4); ARSIWA commentaries, p.66, para.(5)

¹⁴⁶ Aust (2014), p.8, footnotes 32 and 33

¹⁴⁷ DARIO commentaries p.37

¹⁴⁸ Reinisch (2001), p.71

¹⁴⁹ Breau (2013), p.78, see e.g. S/PRST/2013/2, pp.4-5

¹⁵⁰ S/2013/689, para.4

¹⁵¹ S/Res/143 (1960)

¹⁵² S/Res/161 (1961), para.1

¹⁵³ S/Res/1279 (1999)

thorization to use force to protect civilians¹⁵⁴ as well as assisting the government and the Armed Forces of the Democratic Republic of the Congo (FARDC). After MONUC was unable to prevent the killings of civilians at Goma, protection of civilians is now the top priority.¹⁵⁵ In 2010, MONUC was renamed the UN Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) and protection of civilians is still the first priority.¹⁵⁶

Despite having received a lot of criticism for the failure to protect civilians, it is important to remember the mission's achievements as well, such as when MONUSCO's Force Intervention Brigade helped defeat the March 23 Movement (M23), a rebel military group, in 2013.¹⁵⁷ On a more recent occasion, Martin Kobler, Chief of MONUSCO, was happy with the successful FARDC-MONUSCO operation against Front National de Libération (FNL), a Burundian armed group.¹⁵⁸ Notwithstanding the massive criticism, without the PO, the situation in the DRC would probably be worse.

It is undisputed that the situation in the DRC is tragic when seen from a human rights perspective. Civilians are attacked, sexually abused and killed by rebel forces as well as by FARDC.¹⁵⁹ There have been severe violations of IHL and IHRL. In 2009 and 2010 two operations, Kimia II and Amani Leo, were established as joint FARDC/MONUC military operations to eliminate the foreign rebel group, the Democratic Forces for the Liberations of Rwanda (FDLR).¹⁶⁰ MONUC was providing logistical support and occasional fire support, making some civilians consider MONUC as the FARDC's accomplice.¹⁶¹ And MONUC has been criticized for failing to protect civilians as well as providing assistance to the FARDC when they continue to violate international law. The FDLR was reduced by half during Kimia II, but civilians had been attacked by the FARDC.¹⁶² Can the UN be seen as an accomplice to these actions?

With a mandate to assist the FARDC, the UN would be at risk of becoming responsible for the actions of the DRC forces pursuant to the principles in DARIO article 14. After the events during Kimia II, the Security Council adopted the 'conditionality policy' in 2009.¹⁶³

¹⁵⁴ S/Res/1291 (2000), para.8

¹⁵⁵ S/Res/1856 (2008), para.3

¹⁵⁶ S/Res/1925 (2010), para.12

¹⁵⁷ International Coalition for the Responsibility to Protect, at:
<http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-drc#march23>

[Cited: 18 March 2015]

¹⁵⁸ Press release 5 January 2015 at: <http://monusco.unmissions.org>

¹⁵⁹ Human Rights Watch (2005), p.2

¹⁶⁰ Reynaert (2011), p.19

¹⁶¹ *ibid.*

¹⁶² *ibid.*

¹⁶³ S/Res/1906 (2009)

The policy means that MONUC/MONUSCO will only take part and assist the DRC government in operations on the condition that it will not violate international law. It is up to the FARDC to evaluate and remove officers if they still wish to receive MONUSCO support. This policy can be seen as a method to ensure compliance with international law but also as a way to steer clear of responsibility after the principles in DARIO article 14, and the policy is not without criticism. It has been stated that the conditionality policy “emerges from a need for damage-control by the UN, to protect itself from moral, political and potentially legal liability for the substantial war crimes and abuses of FARDC elements who benefit from UN support.”¹⁶⁴ Also, it is argued that “the policy lays the groundwork to deny direct UN responsibility for future war crimes or crimes against humanity by avoiding a situation in which it knowingly supports military action by known violators.”¹⁶⁵

The conditionality policy aspires to eliminate violations of international law. It laid the basis for the Human Rights Due Diligence Policy (HRDDP)¹⁶⁶ which applies not only to peacekeepers, but to all UN entities engaged in support activities.¹⁶⁷ The HRDDP lays down the procedures and how to effectively implement it in the work of the entities.

The conditionality policy has lead to MONUC withholding support to the FARDC in some instances¹⁶⁸ and to the cooperation between MONUC and the FARDC in pre-screening and clearing commanders taking part in joint operations.¹⁶⁹ However, the policy has also led to some criticism concerning the relationship between MONUSCO and the FARDC seeing as the leverage MONUSCO has can cause friction between the two and disturb the diplomatic influence MONUSCO has.¹⁷⁰ In effect, the FARDC can still carry out operations without MONUSCO support and in that way still be able to violate IHL and IHRL. It has also been argued that it is too easy for the FARDC to get around the conditionality policy: “The FARDC have interpreted Amani Leo’s conditionality policy in a way that does not oblige them to vet officers involved in operations if their rank is higher than battalion commander.”¹⁷¹ This enables senior FARDC officers to participate in Amani Leo even though they could be suspected for war crimes.

By approaching the policy in a way that does not require any commanders to withdraw from operations, and also by carrying out operations without MONUSCO support, the intended leverage over the FARDC is in reality not as great as intended. Instead of ensuring

¹⁶⁴ Mahony (2010), p.6

¹⁶⁵ *ibid.*

¹⁶⁶ A/67/775-S/2013/110

¹⁶⁷ *ibid.*, para.6

¹⁶⁸ S/2009/623 para.2

¹⁶⁹ S/2010/164 pp.15-16

¹⁷⁰ Mahony (2010), p.7

¹⁷¹ Vircoulon (2010)

FARDC's compliance with international law it can be seen as a way for the UN to not be held directly responsible by simply not participating in those operations and being selective as to when and where to give support. The top priority for MONUSCO is to protect civilians, which means also in situations when the civilians are attacked by the Congolese army. This can cause strain between the parties, and the desire to avoid such tension may lead to inactivity in regards to the mandate.

If MONUSCO is aware of the approach the FARDC has to the conditionality policy, and continues to support (aid or assist significantly) operations which involve violations of international law – that would fulfill the criteria of knowledge and assistance, as laid down in DARIO article 14, thus making the UN responsible.

4.2 Jurisdictional immunity: denying responsibility and effective remedy in Haiti

In addition to the ability to adopt resolutions and policies making the issue of responsibility difficult, the UN also has broad jurisdictional immunity before judicial entities, adding further complications to the issue. The difficulties which can arise with this can be seen in the case of Haiti.

The UN has been involved in Haiti for a long time. In 1990, the UN was requested by the provisional Government to observe the elections, and sent an Observer Group for the Verification of the Elections in Haiti (ONUVEH). After the coup of the President and the deterioration of the situation, the UN set up the first peacekeeping operation – the UN Mission in Haiti (UNMIH).¹⁷² Between 1994 and 2000, the UN established several peacekeeping missions such as the UN Support Mission in Haiti (UNSMIH), the UN Transition Mission in Haiti (UNTMIH), and the UN Civilian Police Mission in Haiti (MIPONUH).¹⁷³

In the beginning of 2004 armed conflict broke out in the country. The Security Council established the UN Stabilization Mission in Haiti (MINUSTAH) as a response to the threat to international peace and security.¹⁷⁴ This mission was given a mandate including both peacekeeping and humanitarian assistance.¹⁷⁵ When the earthquake struck Haiti in January 2010, the mandate was further expanded to enable the mission to address the crisis.¹⁷⁶ In October 2010, peacekeepers from MINUSTAH leaked raw sewage into Haiti's largest river system spreading cholera across the country. The disease has infected over 690,000 and has killed over 8500 people.¹⁷⁷

¹⁷² Sec/Res/867 (1993)

¹⁷³ Source: <http://www.un.org/en/peacekeeping/missions/minustah/background.shtml>

¹⁷⁴ S/Res/1542 (2004)

¹⁷⁵ S/Res/1542 (2004), paras. 7, 9

¹⁷⁶ S/Res/1908 (2010), paras.1-2; S/Res/1927 (2010), paras 1-8

¹⁷⁷ UN Factsheet: Combatting Cholera in Haiti, January 2014 (updated in February 2014)

MINUSTAH operates under a Chapter VII mandate and it includes the duty to secure a stable environment and to assist in the promotion of human rights.¹⁷⁸ The right to clean water has been acknowledged by the UN Human Rights Council as a human right deriving “from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity”.¹⁷⁹ Contamination of drinking water causing an epidemic as in Haiti is in breach of the right to life and the right against arbitrary deprivation of life, the right to clean water, and highest attainable standard of health.¹⁸⁰ The sanitation system at the MINUSTAH camp was inadequate¹⁸¹ and the Nepalese peacekeepers who were overseeing the camp were not tested for cholera even though there had been recent cholera outbreak in Nepal.¹⁸²

Despite scientific evidence showing the UN was responsible, the UN has denied responsibility and effective remedy for the victims. The UN has relied on a 2011 study which concluded that there was no clear scientific evidence as to what caused the outbreak. The research was conducted by a UN Independent Panel of Experts. However, the experts have since then changed their conclusion and stated that scientific evidence today concludes that MINUSTAH troops caused the epidemic.¹⁸³ In this case the harm was caused by negligence by both the UN and the TCC seeing as the main responsibility for testing the peacekeepers lies with the TCCs,¹⁸⁴ but it is UN’s responsibility to process the information.¹⁸⁵

It should be recalled that in 2001, Kofi Annan as the Secretary-General at the time, stated that the UN has international responsibility for its peacekeepers, and that responsibility includes “liability for damage caused by members of forces during the performance of their duties.”¹⁸⁶

The issues of liability and immunity for the troops and UN personnel are addressed in the SOFA concluded in 2004 between the UN and Haiti.¹⁸⁷ According to paragraph 55 of the Haitian SOFA, unless arising from operational necessity, “[t]hird-party claims for property loss or damage and for personal injury, illness or death arising from or directly attributed to MINUSTAH ... shall be settled by the United Nations”. Paragraph 55 of the agreement provides for the procedure; “any dispute or claim of a private-law character ... shall be settled by

¹⁷⁸ S/Res/1542 (2004), para.7

¹⁷⁹ A/HRC/15/L.14, para.3

¹⁸⁰ ”Peacekeeping without Accountability”, pp.37-39

¹⁸¹ *ibid.*, p.2

¹⁸² *ibid.*, p.22

¹⁸³ *ibid.*, p.3

¹⁸⁴ Medical Support Manual for United Nations Peacekeeping Operations, p.45

¹⁸⁵ Klabbers (2015), p.67

¹⁸⁶ A/51/389, para.7

¹⁸⁷ U.N.T.S Vol. 2271 p.235

a standing claims commission to be established for that purpose.” No such commission has been established in Haiti or in any other UN peacekeeping missions.¹⁸⁸

The UN has broad immunity before national and international courts. Article 105 of the Charter states that the organization and its officials and representatives have “such privileges and immunities as are necessary for the fulfillment of its purposes”.¹⁸⁹ Furthermore, section 2 of the Convention on the Privileges and Immunities of the United Nations¹⁹⁰ (CPIUN) grants general immunity to the UN and its representatives, but also the opportunity for the UN to expressly waive it. It is provided in section 29 that the UN:

“shall make provisions for appropriate modes of settlement of:

- (a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;
- (b) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.”

Although the UN is granted immunity, and is therefore exempted from legal proceedings in order to carry out its tasks, the UN is not granted impunity which would exempt the organization from injurious consequences. The UN itself has accepted that:

“the immunity accorded to the United Nations by Article II of the Convention on the Privileges and Immunities of the United Nations, and the immunity accorded to agents of the United Nations by Articles V and VI, is offset by an obligation in Article VIII to make remedies available to private parties who might otherwise be harmed by the immunity of the Organization and its agents.”¹⁹¹

It is argued that the UN is in breach of the Haitian SOFA and the CPIUN. According to this agreement and convention, the UN is immune before courts but must also “provide to third parties certain mechanisms for holding it accountable if and when it engages in wrongdoing during peacekeeping operations.”¹⁹² Despite never having established a claims commission, the UN has in the past established a “local claims review board”, which is made up by UN personnel only.¹⁹³ In the Secretary-General report, “lump-sum agreements” are mentioned.¹⁹⁴

¹⁸⁸ A/51/389, para 22; Rashkow (2014)

¹⁸⁹ UN Charter article 105(1)-(2)

¹⁹⁰ Adopted by the General Assembly of the United Nations on 13 February 1946

¹⁹¹ *Cummaraswamy Advisory Opinion*, para.5

¹⁹² “Peacekeeping without Accountability”, p.3

¹⁹³ A/51/389, para.20

¹⁹⁴ *ibid.*, paras.34-37

This is when the UN negotiates with the government on behalf of its nationals and it is up to the government to distribute the amount to its citizens. This occurred in the DRC when a lump-sum agreement was accepted in the Congo in relation to ONUC¹⁹⁵.

None of these procedures of settlement have been used in relation to the cholera outbreak in Haiti. Consequently, the victims are denied effective remedy, such as restitution¹⁹⁶ and the guarantee of non-repetition,¹⁹⁷ which is a right “well-established throughout international human rights law”.¹⁹⁸

In an effort to get some reparation, victims of the epidemic petitioned for adjudication and compensation in accordance with the SOFA for the damages they had suffered.¹⁹⁹ It took over a year before the UN replied.²⁰⁰ In its response, the UN invoked immunity under section 29 of the CPIUN, claiming that the question is a matter of public law rather than a private law claim seeing as they believe it raises political and policy issues.²⁰¹ Immunity is the reason behind the obligation to establish a commission as a means to settle disputes.

Article 105 of the Charter grants the UN immunity in order to fulfill its purposes. The immunity granted is therefore based on operational necessity and functionality. Damage caused by operational necessity has been defined as “damage [which] results from necessary actions taken by a peacekeeping force in the course of carrying out its operations in pursuance of its mandate.”²⁰² One cannot argue that the cholera outbreak occurred out of operational necessity, nor has the argument been raised.²⁰³ Furthermore, the letter from the UN does not explain why it should be seen as a public law matter rather than a private law claim. The claim was one of tort, the victims were private individuals and they sought monetary compensation,²⁰⁴ indicating that it is in fact a claim arising from private law.

In October 2013, a lawsuit was filed against the UN in a New York Federal Court. The UN did not officially respond to the lawsuit but asked the US Government to seek dismissal of the case on the UN’s behalf.²⁰⁵ The US Government, as the UN’s host state, did so to protect the UN’s immunity. The oral pleadings took place in October 2014 where the representative for the cholera victims argued that the UN failed to fulfill its obligation to establish a

¹⁹⁵ A/CN.4/SER.A/2004/Add.1 (Part 1), p.11, para.35

¹⁹⁶ Human Rights Committee, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para.16

¹⁹⁷ A/RES/60/147, para.18

¹⁹⁸ “Peacekeeping without Accountability”, p.40

¹⁹⁹ Petition for Relief, MINUSTAH Claims Unit (Nov. 8, 2011)

²⁰⁰ Letter from Patricia O’Brien, U.N. Under-Secretary-General for Legal Affairs, to Brian Concannon, Attorney for the Haitian Cholera Victims (Feb. 21, 2013)

²⁰¹ Boon (2014b)

²⁰² A/51/389 para.13

²⁰³ Boon (2014a)

²⁰⁴ Boon (2013)

²⁰⁵ Lindstrom (2014)

claims commission both under the CPIUN and the Haitian SOFA. Therefore, the UN is not entitled to immunity. Secondly, it was argued that the UN violated the entire CPIUN since the UN did not provide a procedure to provide effective remedy, which is an integral part of the object and purpose of the CPIUN.²⁰⁶

Judge Oetken, of the US District Court, ruled in January 2015 that “the United Nations, MINUSTAH, ... are absolutely immune from suit in this Court”²⁰⁷ in the absence of an express waiver. The judge relied on *Brzak v. United Nations* where the plaintiffs claimed to have been sexually discriminated at their workplace by a UN official.²⁰⁸ The case was dismissed on the ground of immunity under the CPIUN, as was *DeLuca V. United Nations* where the UN withheld DeLuca’s tax monies and consequently made him unable to pay his income taxes.²⁰⁹ The immunity of UN subsidiary organs was also confirmed in the *Sadikoglu* case.²¹⁰

With absolute immunity, the UN is able to avoid responsibility and deny victims any form of reparation. This will lead to unjust results when the UN in fact causes damage, especially as seen in this case where MINUSTAH’s negligence led to thousands of victims. Furthermore, one might ask how the UN can be bound by international law while it cannot be held responsible for violations. The legitimacy of the organization might be damaged if it consistently argues immunity in order not to be held responsible. This way of avoiding responsibility and effective remedy makes it clear that the privileges and immunities for the UN need to be addressed, and responsibility for IOs needs to be clearly laid out.

4.3 DARIO article 7: ‘effective control’ – the correct threshold?

The conduct must be attributable to the UN for it to entail responsibility. When the peacekeepers are the ones conducting the act in question, DARIO article 7 has laid down “effective control” as the test for attribution of conduct.

The DARIO commentaries make a distinction between State organs transferred completely to an IO, and State organs that are still under control of the state while attached to the organization.²¹¹ The conduct of fully seconded organs is attributed to the organization under article 6. This would be attribution under the set of rules concerning “institutional links”.²¹² However, the conduct of not fully seconded organs will be based on the effective control test

²⁰⁶ Delama Georges, et al., v United Nations, et al., Oral Arguments, pp.6-15

²⁰⁷ Delama Georges, et al., v United Nations, et al., Opinion and Order, p.8

²⁰⁸ *Brzak, Ishak, v United Nations, et al.*, 2 March 2010

²⁰⁹ *DeLuca v. United Nations*, NO. 94-7158, United States Court of Appeals, Second Circuit. September 29, 1994

²¹⁰ *Kahraman Sadikoglu, v. United Nations Development Programme*

²¹¹ DARIO commentaries, pp.19-20

²¹² Chapter 1.5

as set out in article 7²¹³ and fall under the rules concerning “factual links”.²¹⁴ For the conduct to be attributed under article 7, the control must be effective but the organ/contingents must also be placed at the organization’s “disposal”. Therefore, two cumulative criteria must be fulfilled.²¹⁵

ARSIWA contains the test of being under “direction or control” when assessing whether the conduct of a person or entity is attributable to the state.²¹⁶ Being under the “direction or control” refers to the ‘effective control’ test as applied by the ICJ in the *Nicaragua*²¹⁷ and *Genocide* cases. It is not clear whether the ‘effective control’ test in ARSIWA is to be interpreted in the same way as in DARIO given the fact that ARSIWA concerns full attribution to one state, whereas DARIO concerns which entity the conduct should be attributed to.²¹⁸ The DARIO commentaries do not clarify the content of the effective control test, however, the ILC argues against the ultimate control test as used by the ECtHR, saying that the test “hardly implies a role in the act in question.”²¹⁹ The ILC further pointed out scholars who noted that the ECtHR did not use the effective control test as envisaged by the ILC, which indicates that the ILC disagrees with the ultimate control test.²²⁰ The “ultimate authority and control” test will be analyzed in chapter 5.3.1.

The DARIO commentaries point out that the test in article 7 is based on “the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization’s disposal.”²²¹ This is similar to that under ARSIWA article 8, which can indicate that the test is meant to be understood the same way.²²²

4.3.1 Effective control as understood in case-law

The effective control test has been interpreted and applied in several cases. I will first examine how it has been understood by the ICJ, then I will show its recognition by the ECtHR. Lastly, the domestic courts in the Netherlands have interpreted and applied the test on several occasions – and their understanding will also be examined.

In the *Nicaragua* case, the ICJ was asked whether the conduct of the Contra forces, which rebelled against the Nicaraguan Government, were attributable to the United States.

²¹³ DARIO commentaries, pp.19-20

²¹⁴ Chapter 1.5

²¹⁵ d’Argent (2014), p.25

²¹⁶ ARSIWA article 8

²¹⁷ Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v US*), Merits, Judgment, I.C.J Reports 1986, p.14

²¹⁸ Larsen (2008), p.515

²¹⁹ DARIO commentaries, p.23

²²⁰ *ibid.*, p.23, footnote 115

²²¹ *ibid.*, p.20

²²² Larsen (2008), p.515

The ICJ stated that in order to have exercised ‘effective control’ it was necessary that the United States “directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State”.²²³ The Contras had been financed, trained, and equipped by the United States,²²⁴ but that was insufficient to attribute some violations of IHL of the Contras to the United States by effective control. This indicates a high threshold for when the conduct is under the ‘effective control’ of a state or organization. The ICJ upheld the effective control test in the 2007 *Genocide* case²²⁵ after the International Criminal Tribunal for the Former Yugoslavia (ICTY) used a different test of “overall control” in the *Tadic* case.²²⁶ In the *Genocide* case, the ICJ had to determine whether the acts of members of the Army of the Republika Srpska could be attributed to the Serbia and Montenegro. The ICJ concluded that the acts could not be attributed to the State.²²⁷

Before the ECtHR, the ‘effective control’ test has been referred to in cases such as *Behrami*, *Saramati*²²⁸ and *Al-Jedda*²²⁹. However, in the *Behrami* and *Saramati* cases a different test was applied - the “ultimate authority and control” test. This test has been criticized for lowering the threshold too much.²³⁰

Turning to domestic law, in the *Nuhanovic* case, the Supreme Court of the Netherlands concluded that the conduct of the Dutch troops during the Srebrenica massacre was attributable to the Netherlands based on an interpretation of the effective control test.²³¹ The Netherlands was found responsible for the death of three men at Srebrenica. The Dutchbat did not evacuate them with the battalion, and they were killed by Bosnian-Serb army or related paramilitary groups.²³² The Court stated in relation to effective control that “the attribution of conduct to the seconding State or the international organization is based on the factual control over the specific conduct, in which all factual circumstances and the special context of the case must be taken into account.”²³³

The Court of Appeal in The Hague in its ruling in the *Nuhanovic* case²³⁴ stated that effective control

²²³ Nicaragua case, para.115

²²⁴ *ibid.*, para.108

²²⁵ Genocide case, para.401

²²⁶ Prosecutor v. Tadic, Appeals Chamber, 15 July 1999, Case no. (IT-94-1-A)

²²⁷ Genocide case, para.415

²²⁸ App.No. 71412/01 Agim Behrami and Beir Behrami v. France and App.No. 78166/01 Ruzhdi Saramati v. France, Germany and Norway, Grand Chamber decision of 2 May 2007 (Behrami/Saramati)

²²⁹ Case of Al-Jedda v. the United Kingdom, App.No 27021/08

²³⁰ Chapter 5.3.1

²³¹ Nuhanovic, 6 September 2013, Supreme Court of the Netherlands, Case No 12/03324

²³² *ibid.*, para.3.2 *XIV*, see Nuhanovic para.3.2 for detailed facts

²³³ *ibid.*, para.3.11.3

²³⁴ Nuhanovic against the State of the Netherlands, Court of Appeal in the Hague, 5 July 2011, Case No 265618

”does not only imply that significance should be given to the question whether that conduct constituted the execution of a specific instruction, issued by the UN or the State, but also to the question whether, if there was no such specific instruction, the UN or the State had the power to prevent the conduct concerned.”²³⁵

This was not disputed in the Supreme Court. The entity with the ability to prevent the conduct will be seen as having effective control over the troops and the act or omission would be attributed to that entity.

In another case, *Mothers of Srebrenica Decision*,²³⁶ the District Court of The Hague found the Netherlands responsible for 300 deaths during the Srebrenica massacre. The District Court looked at DARIO article 7 and stated that effective control is “factual control”²³⁷ and “it comes down to the actual say over specific action whereby all of the actual circumstances and the particular context of the case must be examined”.²³⁸ This interpretation is similar to the wording found in the *Nuhanovic* case. It has also been explained that in “UN military terminology, ‘effective control’ equates to ‘effective command and control’, also referred to as ‘operational control’.”²³⁹

Although DARIO might not have as much weight as ARSIWA, these cases and the fact that several scholars have supported the principle, give article 7 and the effective control test noteworthy weight.²⁴⁰

4.3.2 Difficulties with effective control in practice

Even though the idea of having effective control over a certain conduct seems straightforward, it is not without complications in practice. In this context, there has to be a distinction between having effective control over territory and effective control over specific conduct. While the former is a matter of jurisdiction over territory, thus falling outside the scope of this thesis, the latter is a question of attribution of conduct.²⁴¹

The “effective control” test set out in article 7 does not encompass the intricacies which occur with POs.²⁴² This is more evident if it is possible with dual or multiple attribution of conduct. In practice it can be difficult to establish who had, and what amounts to, effective control over specific conduct. As explained above, the TCCs retain a certain level of control

²³⁵ *ibid.*, para.5.9

²³⁶ *Mothers of Srebrenica et al v. State of The Netherland*, 16 July 2014, Case No.C/09/295247

²³⁷ *ibid.*, para.4.34

²³⁸ *ibid.*, para.4.46

²³⁹ Montejo (2013), p.402

²⁴⁰ Leck (2009) p.4

²⁴¹ See Mull (2012), p.24

²⁴² Larsen (2008), p.518

over their troops. They can withdraw from the operation at any time and can object to changes in deployment of their troops. They also have exclusive criminal, disciplinary and administrative jurisdiction. The TCCs can agree to the details of the engagement before the placement of the troops. Does this mean that the UN does not exercise effective control over peacekeepers? Or does this open the possibility for dual or joint control?

National contingents are supposed to be under UN control but as Murphy states; “[t]his may be the theory, but even a superficial knowledge of United Nations peacekeeping indicates that the reality is much more complex. Few states ever relinquish full operational control to the United Nations.”²⁴³ There have been instances where peacekeepers turn to their state for instructions and approval rather than following instructions given by the force commander. In a report by the Commission of Inquiry regarding attacks on UNOSOM II personnel, it was stated that: “The Force Commander of UNOSOM II was not in effective control of several national contingents which, in varying degrees, persisted in seeking orders from their home authorities before executing orders of the Forces Command.”²⁴⁴ This can be an indication of a lack of effective control by the UN over its peacekeepers and can be an argument for joint or dual control. The level of command and control remaining with the TCC does not, however, amount to exclusive control and that all conduct therefore should always be attributed to the TCC.

In his article, Leck raises three points, which question whether it is only the UN which really has effective control over its peacekeepers. Firstly, that prior to the deployment, the TCCs negotiate tasks and put restrictions upon the employment of peacekeepers. Second, that there are “intimate and structured ‘consultations’ ” between the Force Commander and the TCCs. And lastly, the significant input the TCCs have on Rules Of Engagement (ROE) and the development of operations.²⁴⁵ These three arguments might suggest that the UN does not exercise effective control as envisaged in article 7, but it could also be seen as an argument for dual or multiple attribution. The notion of dual or multiple attribution was not commented on in detail by the ILC in its commentaries to article 7 even though the ILC does not rule it out.²⁴⁶ There are several scholars who argue that this might be possible when instructions are given jointly,²⁴⁷ but instances of such joint attribution have not been many.

In the *Behrami* and *Saramati* cases it was argued that the conduct should be attributed to the NATO TCCs since they had, among other things, imposed national ROEs and retained

²⁴³ Murphy (2003), p.174

²⁴⁴ S/1994/653, p.45 para.243

²⁴⁵ Leck (2009), p.14

²⁴⁶ DARIO commentaries, p.16

²⁴⁷ e.g. Aurel Sari, “Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases” (2008); Kjetil Mujezinovic Larsen, “Attribution of Conduct in Peace Operations: The “ultimate authority and control” Test” (2008)

criminal jurisdiction.²⁴⁸ The ECtHR did not find that the TCCs exercised effective control²⁴⁹ but rather that the conduct was attributable to the UN.²⁵⁰

One might ask whether it would be both easier and better to hold states responsible rather than the UN if the threshold for attributing conduct to the UN is too high. This approach might affect states' willingness to contribute troops to multinational operations such as UN POs. The question of states' willingness to contribute troops can be more relevant in the future after the Netherlands has been held responsible in the *Nuhanovic* and the *Mothers of Srebrenica* cases. Especially if effective control not only covers the execution of acts but also the ability to effectively prevent wrongful conduct. Holding states accountable might be more efficient as states can be brought before national and international courts. Moreover, they are not granted the same immunities as the UN. This could lead to greater chances to ensuring an effective remedy for victims of the internationally wrongful acts.

5 Ways to ensure UN's responsibility?

The UN is currently involved in several conflicts across the world, and is supposed to promote peace and human rights. However, since the UN unfortunately has been involved in violations of international law, it is important that the UN can be held responsible in practice - not only in theory. As I have shown, there are difficulties holding the UN responsible. I will now examine what can be done to mend these problems.

5.1 Conditionality policy

As we saw in chapter 4.3, the conditionality policy is not without difficulties or criticism. The policy should not be used as a fig-leaf to enable the UN to avoid responsibility by being selective as to which operations MONUSCO should participate in.

The approach taken by the FARDC to avoid removing commanders raises the question of "what level of the pyramid of military command" can the policy be "most effectively applied"?²⁵¹ Officers at a high level might not actually have control over lower ranking army members. It is suggested that the policy should aim for commanders who are aware of and able to prevent such atrocities. A difficulty with the policy will always be that the FARDC can decide to carry out operations without MONUSCO support in order to keep its commanding officers.

Furthermore, the policy must entail real consequences for these commanders. A suggestion is made that "[b]eyond temporary re-assignment, it has to limit their access to promo-

²⁴⁸ Behrami/Saramati, para.77

²⁴⁹ *ibid.*, para.139

²⁵⁰ *ibid.*, para.141

²⁵¹ Mahony (2012), p.7

tion” and “limit the access of the worst abusers to control over the richest territories” of natural resource wealth.²⁵² It is only when commanders face the possibility of serious consequences for their actions that the policy will become more efficient in deterring these commanders from committing breaches of international law. That will enable the policy to better work as a tool to ensure compliance with international law, as well as to enable peacekeepers to perform their mandated duties instead of leading to inactivity.

If the UN has the required knowledge of FARDC’s interpretation of the conditionality policy as a way to keep certain commanders, and the UN continues to support operations in which the commanders participate – the UN should be held responsible pursuant to DARIO article 14.

5.2 Jurisdictional immunity: how to secure access to effective remedy

Although immunity for the UN is needed in some instances, it should not deprive victims from reparations for harm suffered. Since the UN does not fulfill its obligations of establishing claims commissions, the immunities granted to the organization should be evaluated.

5.2.1 Proper limits for the immunity of the UN

While immunity based on operational necessity is understandable, absolute immunity will lead to impunity and unjust consequences. When the UN is granted absolute immunity the victims have no forum or way to receive any remedy. Should UN immunity be absolute when the UN is in violation of the obligation to establish a claims commission as stated in the SOFA/CPIUN?

Section 20 of the CPIUN provides that the Secretary-General has a “duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations.” The same wording is found in section 23 of the CPIUN. Admittedly, this is in relation to individuals and not the organization itself but one can argue that it should also be the rule for the immunity granted to the UN as well. When the UN violates clear human rights, one can argue that there should be a duty to waive the immunity. As Singer states, “[t]he functional needs of an international organization demand respect unless a superior norm of international law positively mandates otherwise.”²⁵³ In the case of Haiti, the UN has violated several human rights such as, *inter alia*, the right to clean water, the right to health, and the right to an effective remedy.²⁵⁴ These human rights are fundamental, and hundreds of thousands of people have been affected by the epidemic.

²⁵² *ibid.*, p.8

²⁵³ Singer (1995), p.114

²⁵⁴ “Peacekeeping without Accountability”, pp.37-40

During a radio interview, former UN Special Envoy for AIDS in Africa, Stephen Lewis, said that the UN should be held responsible for the cholera outbreak. “There are instances where immunity should be lifted, and what happened in Haiti is one of those instances.”²⁵⁵ He also stated: “I don’t think [liability] would compromise the UN. In fact, I think it would do the UN a lot of good to be seen as principled in the face of having caused so much devastation.”²⁵⁶ Furthermore, several scholars are also of the opinion that the UN should not be immune in this case.²⁵⁷

Article 105 of the Charter covers operational immunity, while the CPIUN expands the scope to absolute immunity. In cases such as the present one, the immunity should remain functional, which is necessary to make sure the UN does not evade responsibility. Functional immunity will enable the UN to fulfill its purposes and limit the responsibility to acts that are not out of “operational necessity”. This will at least ensure reparations for victims who have suffered from violations of IHL and IHRL when the conduct by peacekeepers exceeds what is necessary or, as what started the cholera epidemic, negligent behavior.

Operational necessity is conduct necessary to carry out tasks mandated to the peacekeeping force. There are four elements that should be evaluated whether an act or operation is necessary:

- a “good-faith conviction” that there is operational necessity;
- the conduct must not exceed what is in fact necessary, and must not be simply a matter of “convenience or expediency”;
- the act or operation must be carried out in accordance with an operational plan;
- the damage should be proportional with what was necessary.²⁵⁸

For functional immunity to be effective and to avoid responsibility, these criteria should be applied strictly as to avoid misunderstandings regarding the scope of operational necessity. The principles in sections 20 and 23 of the CPIUN apply to the organization itself, particularly as the UN is one of the greatest organizations meant to protect and promote human rights and international peace and security.

Limiting the responsibility of the UN to private law matters is understandable seeing as international law largely concerns states rather than private persons. However, it is insufficient for the UN to respond to a claim by stating that it is a political or policy matter without

²⁵⁵ Lewis (2013)

²⁵⁶ *ibid.*

²⁵⁷ See e.g. A/HRC/25/71, para.77; A/HRC/27/55, para.34; Trenton Daniel, *UN Official Pushes Compensation for Haiti Victims*, 2013, (quoting Navi Pillay)

²⁵⁸ A/51/389, para.14

further explanation or at least an official apology to the victims for the wrong that has been done.

5.2.2 Other mechanisms to provide reparations

The UN should comply with its obligations to establish a standing claims commission and thereby providing effective remedy to the victims of its wrongdoing.²⁵⁹ The UN has the opportunity to establish a UN internal “local claims review board”.²⁶⁰ This procedure leaves “the investigation, processing and final adjudication of the claims entirely in the hands of the Organization”²⁶¹, which might not be in compliance with a fair and independent process.²⁶² Furthermore, the disputes before the board are not made public, and the board is established after a dispute arises.²⁶³ This mechanism is for these reasons insufficient, and with the number of claims against the UN growing, the process before the review board is experiencing “longer delays in the settlement of claims”²⁶⁴ causing that “a significant number of claims remain ... unresolved at the end of the [review boards’] liquidation period”.²⁶⁵

So-called lump-sum agreements have been used in the case of Congo in the 1960s. The success of these arrangements depend both on the government’s ability to negotiate with the UN, and a fair distribution to the victims of the sum given by the UN.²⁶⁶ This is not necessarily the best way to ensure the fair reparation to the victims.

Another possibility would be to expand the ICJ’s jurisdiction so that the UN can appear before it. Article 34 of the ICJ Statute provides that only states can appear before the ICJ. Although legal persons do not have standing before the ICJ, a State may stand as their representative if there has been a breach of an international obligation.²⁶⁷ The Charter, the CPIUN and the ICJ Statute were made before the UN became such an important actor in the international community. The idea of allowing the UN access to the ICJ has been raised on several occasions. In 1945, Venezuela suggested that IOs should be able to appear before the ICJ.²⁶⁸ In 1954, the Institut de Droit International saw it as a matter of urgency to provide access to the court for IOs if a majority of the member states were members of the UN or parties to the

²⁵⁹ Chapter 4.2

²⁶⁰ A/51/389, para.22

²⁶¹ *ibid.*, para.20

²⁶² Dannenbaum (2010), p.126

²⁶³ *ibid.*, pp.126-127

²⁶⁴ A/51/389, para.26

²⁶⁵ A/51/389, para.28; Dannenbaum (2010), p.127

²⁶⁶ A/51/389, para.37; Dannenbaum (2010), pp.127-128

²⁶⁷ Telesetsky (2011), p.13

²⁶⁸ Doc.284 IV/1/24, (1945), cited in Telesetsky (2011), p.15

ICJ Statute.²⁶⁹ The ILA expressed the desire of an amendment to give the UN and its Specialized Agencies access to the ICJ in contentious cases.²⁷⁰

Furthermore, the ICJ judge, and former President, Mohammed Bedjaoui suggested that the ICJ's contentious jurisdiction should perhaps be broadened to include IOs:

“International life shows us every single day that, at this level, greater account must be taken of other entities, notably, the international organizations. Access to the Court's contentious procedure, currently reserved for States alone, may therefore now seem too narrow.”²⁷¹

Despite being theoretically possible to expand the ICJ's jurisdiction, actually doing so would be more problematic. An amendment to the ICJ Statute requires a high level of consensus: the same level of consensus as an amendment to the Charter.²⁷² Any amendments to the Charter or the ICJ Statute must be

“adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council”²⁷³

Although legally possible, it will be politically difficult to agree to such an expansion of the ICJ's jurisdiction.

The best option would be for the UN to comply with its obligation to establish a standing claims commission. The UN and the Host State would each appoint one member of the commission and the parties would jointly appoint the last,²⁷⁴ thereby ensuring more trust in the commission's independence and fairness as opposed to the “local claims review board.” This would enable the victims to be heard and get some form of judicial review.

5.3 A more suitable test for attribution of conduct than ‘effective control’?

Since there are some difficulties regarding how to apply effective control in practice, perhaps there are other tests more appropriate to encompass the complexities. The ‘ultimate authority

²⁶⁹ Wellens (2002), p.237, citing *Annuaire de l'Institut de Droit International* 45 (2) (1954) 289, para.6

²⁷⁰ *ibid.*, p.236, citing ILA Report of the 47th conference, p.104

²⁷¹ General Assembly, Fiftieth Session, Plenary (October 11, 1995), statement by the President of the ICJ

²⁷² ICJ Statute article 69

²⁷³ Charter article 108

²⁷⁴ UN Model SOFA 51; Haitian SOFA 55

and control’ test, the ‘overall control’ test, and multiple attribution of conduct have been suggested by scholars and courts.

5.3.1 ‘Ultimate authority and control’ as applied in the *Behrami* and *Saramati* cases

While DARIO uses effective control as the determining test, the ECtHR did not apply it. Instead, they relied on the “ultimate authority and control” test which has been criticized.²⁷⁵ The ECtHR concluded in the *Behrami* and *Saramati* cases that the conduct by UN Mission in Kosovo (UNMIK) and NATO Kosovo Force (KFOR) troops in Kosovo is attributable to the UN using the ‘ultimate authority and control’ test. Seeing as the acts were attributable to the UN, the Court was not competent to examine the case further.

In the *Saramati* case, Ruzhdi Saramati was arrested and the KFOR Commanders extended his detention period. It was argued that this way of proceeding was against articles 5 (right to liberty and security) and 6 (right to a fair trial) of the European Convention on Human Rights (ECHR). Since the commanders who extended his detention period were Norwegian and French, the case was brought against Norway and France.²⁷⁶

In the *Behrami* case, it was argued that the French KFOR troops had failed to de-mine or mark the areas where they knew cluster bombs were. This caused the death of Gadaf Behrami and the injuries of Bekim Behrami, and the application was founded on article 2 ECHR (right to life).²⁷⁷ The two cases were joined before the ECtHR, and the Court came to the conclusion that it was within the mandate of KFOR to issue detention orders and the supervision of de-mining was in UNMIK’s mandate.²⁷⁸ The Court also noted that the mandates were based on a Chapter VII resolution²⁷⁹ and since UNMIK was a subsidiary organ of the UN, UNMIK’s conduct was attributable to the UN.²⁸⁰

In regards to KFOR the Court saw the question as being “whether the UNSC retained ultimate authority and control so that operational command only was delegated.”²⁸¹ The Court then interpreted S/Res/1244 (1999) to conclude that the Security Council retained ultimate authority and control over KFOR and that NATO was delegated the operational command.²⁸² Even though the TCCs had some authority over its troops, the Court considered it of importance that the operational command NATO had was effective.²⁸³

²⁷⁵ See e.g. Larsen (2008); Bell (2010); DARIO commentaries, p.23, footnote 115

²⁷⁶ *Behrami/Saramati*, paras.8-17

²⁷⁷ *ibid.*, paras.5-7

²⁷⁸ *ibid.*, para.127

²⁷⁹ *ibid.*, para.130

²⁸⁰ *ibid.*, para.143

²⁸¹ *ibid.*, para.133

²⁸² *ibid.*, para.135

²⁸³ *ibid.*, para.138

As Larsen points out, the Court does not provide legal basis for the ultimate authority and control test - the expression does not occur in the commentaries to ARSIWA or DARIO, or in ICJ's case law.²⁸⁴ However, some support can be found in legal literature.²⁸⁵

The ultimate authority and control test has been criticized for simply attributing conduct and responsibility to the UN as long as it was the UN who had given the mandate.²⁸⁶ As a test for attribution of conduct, the test is very wide.²⁸⁷ Furthermore, the ILC and several scholars rejected the ultimate authority and control test,²⁸⁸ as did the Secretary-General when he stated: "It is understood that the international responsibility of the United Nations will be limited to the extent of its effective operational control."²⁸⁹

If the ultimate authority and control test is the appropriate one, "it would produce grossly unjust results" and victims would often "be without remedy for the harm done to them."²⁹⁰ If giving the mandate would be sufficient for conduct to be attributed to the UN, the UN would be held responsible simply because they authorized the operation. The threshold for attribution of conduct would be too low, thereby relieving states from becoming responsible. Furthermore, the states might lose the incentive to make sure their troops act in conformity with international law since they would not be held responsible.²⁹¹ Clarifying the parameters for international legal responsibility would create the necessary legal certainty as to who is to be held responsible for a given conduct. Lack of such certainty would lead to unjust results towards individuals given the jurisdictional immunity given to the UN through article 105 of the Charter²⁹² and the CPIUN.

5.3.2 'Overall control' in the *Tadic* case

Another possible test for attribution of conduct could be the "overall control" test from the *Tadic* case before the ICTY. The ICTY had to determine whether the conflict in Bosnia was an international or a non-international armed conflict.²⁹³ The conflict would be international if it involved two or more states, or if it was against one state and armed forces belonging to a "Party to the conflict".²⁹⁴ If the conflict was a non-international armed conflict, *Tadic* could

²⁸⁴ Larsen (2008), p.521

²⁸⁵ Sarooshi (1999), p.163 and p.165

²⁸⁶ Leck (2009), pp.17-18

²⁸⁷ Larsen (2008), p.523

²⁸⁸ DARIO commentaries, p.23, para.10

²⁸⁹ S/2008/354, para.16

²⁹⁰ Mull (2012), p.27

²⁹¹ Mull (2012), p.28; Leck (2009), p.18

²⁹² Mull (2012), p.27

²⁹³ Cassese (2007), p.656

²⁹⁴ *Tadic*, para.93

not be held liable for breaches of the Fourth Geneva Convention, seeing as article 2 states it is only applicable in international conflicts.

The Appeals Chamber found the effective control test, as applied in the *Nicaragua* case, to be against the system of international responsibility and by setting the threshold too high it would enable states to act through private individuals.²⁹⁵ The Appeals Chamber further held that there should be a flexible approach to the question and both effective control and the overall control tests were relevant but under different circumstances. Whereas the effective control test would be more appropriate in relation to the acts of private individuals²⁹⁶ the overall control test was more suitable for the acts of armed groups.²⁹⁷ Accordingly, the overall control test would be applicable to a group of peacekeepers and attributing their conduct to the UN.

In the overall control test it is sufficient to exercise “overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity”.²⁹⁸ Furthermore, the Appeals Chamber stated it was not necessary to give instructions “concerning the conduct of military operations and any alleged violations of international humanitarian law”.²⁹⁹ Despite “effective control” being the test used by the ICJ, the Appeals Chamber did look at state practice and jurisprudence to find support for the overall control test.³⁰⁰

The ICJ stated in the *Genocide* case that the overall control test “has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility”.³⁰¹ Leck argues that the test would simply lower the threshold for attribution of conduct and would still have the same difficulties with the command and control system as effective control.³⁰² As with the ultimate authority and control test, the overall control test would set the threshold too low and the UN would automatically become responsible thus creating unjust results.³⁰³

5.3.3 Dual or multiple attribution

Seeing as TCCs do in fact have full command over its contingents, one should look at the possibility of attributing the conduct to both the UN and the TCCs, thus possibly holding all parties involved responsible. In its commentaries, the ILC does not exclude the possibility of

²⁹⁵ *ibid.*, paras.116-117

²⁹⁶ *ibid.*, paras.118-119, 141

²⁹⁷ *ibid.*, paras.131, 137

²⁹⁸ *ibid.*, para.131

²⁹⁹ *ibid.*, para.137

³⁰⁰ *ibid.*, paras.124-149

³⁰¹ *Genocide* case, para.406

³⁰² Leck (2009), p.17

³⁰³ See the end of chapter 5.3.1

dual or multiple attribution,³⁰⁴ meaning that the conduct of the contingents can be attributed to both the TCC and the UN. As it is noted, “attribution of responsibility and attribution of conduct do not necessarily correspond to each other, in that the effective functioning of each does not depend on the other”.³⁰⁵ In this case it is the multiple attribution of conduct that is questioned. Dual or multiple attribution can occur when one person or organ acts on behalf of more than one state or organization at the same time, or when the conduct is carried out jointly by two or more entities each acting on behalf of its own state or IO.³⁰⁶

Even though the ILC does not dismiss the possibility of dual or multiple attribution, the ILC also states in relation to DARIO article 7 that the “criterion for attribution of conduct either to the contributing state or to the receiving organization is based ... on the factual control” exercised over the specific conduct.³⁰⁷ The wording “either” and “or” seems to suggest attribution of conduct is exclusive to one entity.³⁰⁸ Messineo regards DARIO article 7 as an exception to multiple attribution of conduct and that it is meant to determine which entity the conduct is exclusively attributable to.³⁰⁹ Additionally, it has been said that “conduct is in principle attributed to one actor only” and that “[d]ual attribution, if possible at all, is very rare”.³¹⁰ This could mean that the ILC’s position that multiple attribution is possible would fall under DARIO article 9 where the organization acknowledges the conduct as its own.³¹¹ The ECtHR in the *Behrami* and *Saramati* cases examined whether the conduct was attributable to the UN instead of the TCCs, “which indicates its assumption that the conduct could only be attributed to one or the other.”³¹²

On the other hand, some scholars and national courts seem to accept that dual or multiple attribution of conduct is possible and should perhaps be the standard rule.³¹³ POs are carried out by troops made available by TCCs, and as mentioned, DARIO makes a distinction between State organs fully and not fully seconded to the organization. As Sari comments, “seconded State organs only carry out tasks on behalf of the receiving organization because they are under the instructions of their home State to do so in the first place”³¹⁴ and this can be an argument for that no State organ can be completely transferred to an organization, and ac-

³⁰⁴ DARIO commentaries, p.16

³⁰⁵ Fry (2014), p.106

³⁰⁶ Messineo (2011), p.10

³⁰⁷ DARIO commentaries, p.20, para.4

³⁰⁸ d’Argent (2014), p.30

³⁰⁹ Messineo (2011), pp.32-44

³¹⁰ Nollkaemper (2011), p.38

³¹¹ d’Argent (2014), pp.29-30

³¹² Mull (2012), p.16

³¹³ See e.g Leck (2009) and the Nuhanovic case

³¹⁴ Sari (2012), p.79

cordingly being under joint control. When it comes to national contingents this is even more evident seeing as the TCC retains criminal jurisdiction.

Gaja states:

“With regard to the military operations run by forces put at the disposal of the United Nations, effective control will generally rest with the United Nations. However, there have been circumstances under which the contributing State has played a decisive role in the conduct of its forces. Conduct will then have to be attributed to the State or, as the case may be, jointly to the State and the Organization.”³¹⁵

According to him, joint attribution of conduct is therefore not ruled out, neither is it ruled out in relation to DARIO article 7 as is seen in the Seventh Report.³¹⁶ He suggested in relation to the *Bankovic* and the *Legality of the Use of Force* cases, “one envisageable solution would be for the relevant conduct to be attributed both to NATO and to one or more of its member States, for instance because those States contributed to planning the military action or to carrying it out.”³¹⁷ He further suggests that the acts can be contributed to one entity, while omission of preventative measures could be contributed to the other.³¹⁸

Additionally, the Supreme Court of the Netherlands affirmed the Court of Appeal’s approach to dual or multiple attribution of conduct in the *Nuhanovic* case.³¹⁹ The Court of Appeal opened up the possibility that both the UN and the State had effective control, thus opening the possibility for dual attribution of conduct.³²⁰ The Hague Court of Appeal stated explicitly that

the Court adopts as a starting point that the possibility that more than one party has “effective control” is generally accepted, which means that it cannot be ruled out that the application of this criterion results in the possibility of attribution to more than one party.³²¹

The District Court of the Hague also opens for dual attribution in the case of *Mothers of Srebrenica*.³²²

³¹⁵ Gaja (2014), p.5

³¹⁶ A/CN.4/610 (2009), p.9, para.24

³¹⁷ A/CN.4/541, para.7

³¹⁸ *ibid.*, para.42

³¹⁹ Supreme Court judgement, *Nuhanovic*, paras.3.9.4 and 3.11.2

³²⁰ Appeal judgement, *Nuhanovic*, paras.5.7-5.8

³²¹ *ibid.*, para.5.9

³²² *Mothers of Srebrenica*, para.4.34

Dual or multiple attribution of conduct is still controversial although there are good reasons for accepting such an approach when the TCCs send troops to a PO. By making it possible for both entities to become responsible for the same conduct it might encourage the TCCs to train their troops thoroughly as to avoid breaches of international law. It might also lead the UN to avoid “pursuing riskier tactical operations”.³²³

5.3.4 A proper solution?

None of the suggested tests are without difficulties. One must try to find the solution which best meets the complexities of POs, as well as offers the best results in terms of sharing the responsibility between the UN and TCCs and ensuring that victims of violations receive reparations for harm suffered. Although the effective control test has its difficulties, it is submitted that the effective control test over factual circumstances would be the appropriate threshold if combined with the possibility of dual or multiple attribution of conduct. It has been stated that “[m]ost scholars and jurists generally hold that peacekeepers are, in general, under the effective control of the UN during that period that they are placed at the disposal of the UN, except for that rare instance when a TCC may override the Force Commanders instructions and assume effective control.”³²⁴ This will ensure the balance between the need for TCCs to properly train their contingents and ensure compliance, as well as attributing the conduct to the entity that ordered the conduct or the entity which “was in the best position to prevent the conduct.”³²⁵

Evaluating which entity in fact had effective control, and possibly considering the troops as being under joint control, would cover more likely scenarios and be the most flexible approach.³²⁶ Lastly, “dual or multiple attribution of conduct, leading to joint or several responsibility of the parties concerned, would be in line with the aims of international responsibility, which is to prevent breaches of international law through deterrence.”³²⁷

6 Concluding remarks

Accountability for IOs is a topic that needs to be addressed more in the future. As shown, holding the UN responsible is not without difficulties given the immunities granted, the complexities with the command and control structure in POs, and the opportunity the UN has to adopt resolutions and policies. Although the international community needs peacekeepers in the frontlines working for peace and security, it is also important to be able to hold the organization (UN or relevant regional or security organization) responsible for their mistakes.

³²³ Leck (2009), p.19

³²⁴ *ibid.*, p.12

³²⁵ Mull (2012), p.29

³²⁶ Leck (2009), p.17

³²⁷ *ibid.*, p.18

Policies and resolutions adopted by the UN can indeed be beneficial and lead to compliance with international law. The conditionality policy might work as leverage and steer the tragic situation in the DRC in a more positive direction. However, as shown, it can also lead to ineffective POs as the host state can choose to carry out operations without UN assistance. If that is the consequence of the policy, the UN should not be able to simply stand on the sideline and watch violations of international law being committed. The UN would be free from legal responsibility pursuant to DARIO art 14 but from a moral and ethical standpoint, it would hardly be appropriate for the biggest promoter of peace and security.

Determining the appropriate test for attribution of conduct is important. There needs to be clear rules for when the UN or the TCC is responsible for the conduct in question. If the threshold for attribution to the UN is too low, the TCCs might become less thorough in training their troops to comply with international law. On the other hand, if the threshold is too high, states would become responsible more often and perhaps more hesitant when it comes to contributing troops.

More important than determining the proper threshold for attribution is determining the proper limits for the UN's immunity, which the situation in Haiti has especially highlighted. If the immunity is absolute, the UN can always avoid responsibility no matter what policies it adopts or which test for attribution is used. This would damage the organization's credibility and legitimacy. Immunity for organizations is necessary from a functional point of view, however, gross negligence such as in the cholera incident should not be accepted. Therefore, it is my contention that the issue of immunity and accountability should be given more attention.

Additionally, the establishment of a claims commission pursuant to the SOFA should be mandatory and should be established routinely at the arrival of the peacekeeping troops. The UN should comply with its obligations it enters with the host state, as well as comply with the obligation to provide reparation. This could also mean an official apology, something the victims of the cholera outbreak never have received. It remains to be seen how the UN will continue to deal with the criticism in relation to the situation in Haiti, as well as how the UN will handle future problems.

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